No. 98-1441

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, Warden, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed March 4, 1999
Certiorari Granted May 3, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-1441

ERNEST C. ROE, Warden, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

DOCKET ENTRIES
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA
petitioner

v.

ERNEST C ROE
respondent

ATTORNEY GENERAL CA
respondent

DATE NR. PROCEEDINGS

7/27/95 1 PETITION FOR WRIT OF HABEAS CORPUS to Magistrate Judge Hollis G. Best (tb)

7/27/95 2 MOTION to proceed in forma pauperis by petitioner (tb)

7/27/95 3 MOTION for appointment of guardian ad litem by petitioner (tb)

7/27/95 4 NOTICE regarding case number and local rules (tb)

9/26/95 5 ORDER by Magistrate Best DENYING motion for appointment of guardian ad litem by petitioner [3-1], GRANTING motion to proceed in forma pauperis by petitioner [2-1]; directing service and returning documents case mgmt ddl set for 10/26/95 to respond to petition (cc: all counsel) (tb)

11/13/95 6 ORDER by Magistrate Judge Hollis G. Best case mgmt ddl set for 11/27/95 for respondents to file a response to petition (cc: all counsel) (lm)

11/17/95 7 ANSWER by respondent Ernest C Roe (rm) [Entry date 11/20/95]

11/17/95 8 NOTICE by Ernest C Roe of lodging documents (rm) [Entry date 11/20/95]

11/17/95 -- LODGED state record by Ernest C Roe (rm) [Entry date 11/20/95]

11/22/95 9 PROOF OF SERVICE by respondents of [8-1] (rm) [Entry date 11/27/95]

11/22/95 10 PROOF OF SERVICE by respondents of [7-1] (rm) [Entry date 11/27/95]

11/27/95 11 NOTICE OF LODGING OF DECLARATION of Nancy Kops (rm) [Entry date 11/28/95]

7/12/96 12 ORDER by Judge Best appoints Federal Defender to represent petitioner; contents of file to be copied and sent to Federal Defender; evidentiary hearing set for 10:00 11/1/96; case mgmt ddl set for 8/15/96 for objections to evidentiary hearing (cc: all counsel) (dg) [Entry date 07/15/96]

7/29/96 13 ATTORNEY APPEARANCE for petitioner by Ann Hardgrove Voris (rm) [Entry date 07/30/96]

10/9/96 14 ORDER by Magistrate Judge Best for issuance of a writ of habeas corpus ad testificandum (cc: all counsel) (pp) [Entry date 10/10/96]

10/9/96 15 WRIT issued to produce Lucio Flores Ortega (pp) [Entry date 10/10/96]

10/28/96 -- LODGED stipulation/order to continue evidentiary hearing by respondents (rm) [Entry date 10/29/96]

11/1/96 16 STIPULATION AND ORDER by Magistrate Judge Hollis G. Best to continue evidentiary hearing set for 10:30 1/24/97 before Judge Best (cc: all counsel) (rm) [Entry date 11/04/96]

12/27/96 17 MOTION for a writ of habeas corpus ad testificandum by Lucio Flores Ortega Motion Hearing Set for 1/24/97 10:30 (rm) [Entry date 12/30/96]

12/27/96 -- LODGED order re writ of habeas corpus ad testificandum by Lucio Flores Ortega (rm) [Entry date 12/30/96]

1/6/97 18 ORDER by Magistrate Judge Hollis G. Best to issue writ of habeas corpus ad testificandum as to Lucio Ortega (cc: all counsel) (rm) [Entry date 01/07/97]

1/7/97 -- WRIT of habeas corpus ad testificandum issued as to Lucio Ortega (rm)

1/10/97 19 PRE-HEARING BRIEF by respondent Ernest C Roe and Attorney General CA (hl) [Entry date 01/13/97]

1/24/97 20 EXHIBIT AND WITNESS list (mh) [Entry date 01/27/97]

1/24/97 21 DECLARATION of Cheryl Sauceda (mh) [Entry date 01/27/97]

1/24/97 22 MINUTES of 1/24/97 before Magistrate Judge Best briefs due 3/14/97 C/R G. Gibson (mh) [Entry date 01/27/97] [Edit date 01/27/97]

2/5/97 23 TRANSCRIPT of proceedings on 1/24/97 re: evidentiary hearing by C/R Dorothy Gibson (mh) [Entry date 02/06/97]

3/14/97 24 POST-HEARING BRIEF by petitioner (rm) [Entry date 03/17/97]

3/14/97 25 CJA 24 authorization and voucher for payment of transcript For petitioner (rm) [Entry date 03/17/97]

3/14/97 26 POST-HEARING BRIEF by respondent (rm) [Entry date 03/17/97]

4/3/97 27 FINDINGS AND RECOMMENDATIONS by Magistrate Judge Hollis G. Best Recommending dismissal of motion for a writ of habeas corpus ad testificandum by Lucio Flores Ortega [17-1] REFERRED to Judge Garland E. Burrell Case Mgmt Ddl set for 5/5/97 file objections (cc: all counsel) (il)

5/2/97 28 OBJECTIONS TO FINDINGS AND RECOMMENDATIONS [27-1] by petitioner Lucio Flores Ortega (cc) [Entry date 05/06/97]

5/19/97 29 REPLY by respondent to petitioner's objections [28-1] (mh) [Entry date 05/20/97]

6/18/97 -- MAIL to Sacramento Office case file in one vol docs 1-19 to GEb chambers for order re FRs (tb)

6/30/97 30 ORDER by Judge Garland E. Burrell ORDERING Findings & Recommendation order [27-1] ADOPTED, habeas corpus petition [1-1] DENIED dismissing case (cc: all counsel) (kdc)

6/30/97 31 JUDGMENT issued in accordance with the court's order of 6/30/97 (cc: all counsel) (kdc)

7/10/97 -- MAIL to Fresno Office: 1 volume, documents 1 -29 (kdc)

7/16/97 32 NOTICE OF APPEAL by petitioner Lucio Flores Ortega from District Court decision (fee status IFP) (hl) [Entry date 07/17/97]

8/5/97 33 TRANSCRIPT DESIGNATION and Ordering Form for dates 1/24/97 appeal [32-1] regarding evidentiary hearing transcript [23-1] (mh) [Entry date 08/06/97]

8/18/97 34 CERTIFICATE OF RECORD transmitted to 9th Circuit [32-1] (notice sent) (hl)

8/27/97 -- MAIL to Sacramento Office of 1 volume documents 1 thru 34 (hl) [Edit date 10/02/97]

10/6/97 35 REQUEST by petitioner Lucio Flores Ortega for certificate of probable cause (lh) [Entry date 10/07/97]

10/10/97 36 ORDER by Judge Garland E. Burrell ORDERING request [35-1] for certificate of probable cause ISSUED (cc: all counsel) (gk)

10/20/97 37 MAIL returned [25-1] addressed to petitioner Lucio Flores Ortega (kdc) [Entry date 10/21/97]

10/23/97 38 MAILED case information/docket fee payment notice copy of Notice of Appeal and appealed 6/30/97 judgment to 9th Circuit Court of Appeals copy of appeal and certified copy of docket sheet to all parties (lm)

10/30/97 39 MAIL returned/ notification of appeal [38-1] addressed to petitioner Lucio Flores Ortega [envelope indicates return to sender, not at CSP-LAC] (cc) [Entry date 10/31/97]

8/25/98 40 CLERK'S record on appeal transmitted to 9th Circuit original case file volumes 1 transcripts 1 and certified copy of docket mailed to 9th Circuit regarding appeal [32-1] (cc: all counsel) (hl) [Entry date 08/26/98]

9/30/98 41 LETTER to court from counsel for respondents Ernest C Roe, Attorney General CA re appeal (il) [Entry date 10/01/98]

10/2/98 42 COPY OF SUPPLEMENTAL AUTHORITY sent to the 9th Circuit by respondent re Argument E (dld) [Entry date 10/05/98]

11/9/98 43 REQUEST for clerk's record to be returned from the Ninth Circuit Court of Appeals (il) [Entry date 11/10/98]

11/18/98 44 STATEMENT of counsel sent to USDC by the Ninth Circuit (ls) [Entry date 11/20/98]

11/23/98 45 RECORD on appeal returned from 9th Circuit volumes 1 transcripts 1 (mm) [Entry date 11/24/98]

2/8/99 46 CERTIFIED COPY of judgment from 9th Circuit the Decision of the District Court [Appeal

[32-1]] REVERSED and REMANDED (cc: all counsel) (jv) [Entry date 02/10/99]

3/1/99 47 ORDER by Judge Anthony W. Ishii ORDERING Case REASSIGNED to Judge Anthony W. Ishii (cc: all counsel) (mh) [Entry date 03/02/99]

3/1/99 48 ORDER by Judge Anthony W. Ishii ORDER granting conditional writ case mgmt ddl set for 6/1/99 (cc: all counsel) (mh) [Entry date 03/02/99]

3/3/99 49 Order from Circuit Court pursuant to the Supreme Court's order dated 2/8/99, the mandate in the above matter is hereby recalled; The mandate will remain stayed pending further order of the Supreme Court (mh) [Entry date 03/04/99]

3/11/99 50 MAIL returned [47-2] addressed to petitioner Lucio Flores Ortega (Envelope indicates return to sender/Not at CSP-LAC) (mh) [Entry date 03/12/99]

3/12/99 51 REQUEST by respondent for court to stay order of 3/1/99 (ls) [Entry date 03/15/99]

3/12/99 52 PROOF OF SERVICE by respondent of [51-1] (ls) [Entry date 03/15/99]

3/19/99 53 ORDER by Judge Ishii ORDERING request to stay action [51-1] GRANTED Court stays conditional writ issued on 3/1/99 pending further order of the Ninth Circuit or a ruling on a properly filed and noticed motion (cc: all counsel) (rab) [Entry date 03/22/99]

3/19/99 54 NOTICE by respondent Attorney General CA regarding copy of order from the Ninth

Circuit denying rehearing of the petition (rab) [Entry date 03/22/99]

3/29/99 55 MAIL returned Re Order Staying Action [53-1], [53-2] addressed to petitioner Lucio Flores Ortega (Petitioner not at CSP-LAC) (rab) [Entry date 03/30/99]

5/18/99 56 NOTICE regarding State Court proceedings (sr) [Entry date 05/19/99]

5/24/99 57 NOTICE: from Fresno County Superior Court of motion for reconsideration before Judge Keyes granted and Order of 5/12/99 vacated (tw) [Entry date 05/25/99]

DOCKET ENTRIES
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCIO FLORES ORTEGA
Petitioner - Appellant

No. 97-17232

v.

ERNEST C. ROE, Warden
Respondent - Appellee

Docket as of June 2, 1999 11:21 pm

12/3/97 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 7/28/97; appellee's designation of RT is due 8/5/97; appellant shall order transcript by 8/15/97; court reporter shall file transcript in DC by 9/15/97, ; certificate of record shall be filed by 9/22/97 ; appellant's opening brief is due 1/7/98; appellees' brief is due 2/6/98; appellants' reply brief is due 2/20/98; [97-17232] (ft)

12/31/97 Filed order (Deputy Clerk: wp) The opening brief is due 2/9/98 the answering brief is due 3/9/98 the reply brief is due 14 days after service of the aples brief. [97-17232] (wp)

2/9/98 14 day oral extension by phone of time to file Appellant brief. [97-17232] appellants' brief due 2/23/98; appellees' brief due 3/25/98; the optional reply is due 14 days from service of the answering brief. (cg)

2/23/98 Filed original and 15 copies aplt's opening brief of 16-pgs with cert of compliance; and 5 excerpts of record; served on 2/20/98. (Informal: no) [97-17232] (rc)

3/25/98 Filed original and 15 copies aple's answering brief of 23-pgs with cert of compliance; and 5 supp'l excerpts of record; served on 3/23/98. [97-17232] (rc)

3/25/98 Filed aple's pre-sentencing report UNDER SEAL. (RECORDS)
[97-17232] (rc)

6/26/98 Calendar check performed [97-17232] (aw)

7/30/98 Calendar materials being prepared. [97-17232] [97-17232] (uk)

7/31/98 CALENDARED: SF 10/5/98 1:30 pm Courtroom 3 [97-17232] (uk)

9/29/98 Filed order (Deputy Clerk for Court: GB) the court is of the unanimous opinion that the facts and legal arguments are adequately presented in briefs & record. . . . FRAP 34 and 9th Cir. R. 34-4. Accordingly, this case shall be submitted on the briefs and record, w/out oral argument, on October 5, 1998, in SF, CA. (phoned counsel) [97-17232] (db)

9/29/98 Rec'd ltr dtd 9/28/98 from counsel for aple, re: additional citations -- citing Morales v. United States, 143 F.3d 94, 96-97 (2d Cir 1998), and Fernandez v. United States, 146 F.3d 148, 148-49 (2d Cir. 1998). Deficient -- does not comply with provisions of FRAP 28(j) regarding reference to page or argument point(s) in brief. Counsel notified to submit corrected 28(j) letter. (faxed to panel) [97-17232] (db)

10/1/98 Rec'd ltr dtd 9/30/98, re: corrected additional citations (informing court the applicability of the two cases cited to the page reference in aple's brief) (faxed to panel) [97-17232] (db)

10/5/98 SUBMITTED ON THE BRIEFS TO: Robert R. BEEZER, Cynthia H. HALL, Pamela A. RYMER [97-17232] (mlm)

11/2/98 FILED OPINION: REVERSED & REMANDED (Terminated on the Merits after Submission Without Oral Hearing; Reversed; Written, Signed, Published. Robert R. BEEZER, author; Cynthia H. HALL; Pamela A. RYMER.) FILED AND ENTERED JUDGMENT. [97-17232] (db)

11/16/98 [3565182] Filed original and 40 copies Appellee Ernest C. Roe petition for rehearing with suggestion for rehearing en banc in 15 pages served on 11/13/98. (PANEL and all active judges) [97-17232] (lp)

11/17/98 Received Appellee Ernest C. Roe's (Statement of Counsel) addendum to Respondent's Petition for Rehearing, served on 11/16/98 (PANEL-all active judges) [97-17232] (lp)

11/30/98 Filed Ernest C. Roe additional citations, served on 11/23/98. (PANEL and all active judges) [97-17232] (lp)

12/11/98 Filed order (Robert R. BEEZER, Cynthia H. HALL, Pamela A. RYMER).....the petition for rehearing is DENIED and the suggestion for rehearing en banc is rejected. (FOR COMPLETE SEE ORDER) [3565182-1] [97-17232] (rc)

12/17/98 Filed aple's mtn for stay of issuance of mandate and declaration in support of mtn to stay mandate for time to file a petition to the Supreme Ct for a writ of certiorari; served on 12/16/98. (AUT) [97-17232] [3587657] (rc)

1/14/99 Filed order (Robert R. BEEZER): Aplt's motion for stay of mandate for time to file a petition for writ of cert, filed with this court on 12/17/98, is DENIED. [97-17232] (ft)

2/4/99 MANDATE ISSUED [97-17232] (lp)

2/8/99 Filed Supreme Court order (SC Date: 2/8/99) upon consideration of the application of csl for the applicant. It is ordered that the mandate of the USCA for the 9th Cir., case No. 97-17232 is stayed pending receipt of a response, due on or before 2/15/99, and further order of the undersigned or of the CT. (AUT) [97-17232] (rc)

3/1/99 Filed order (Robert R. BEEZER,): Pursuant to the Supreme Court's order dated 2/8/99, the mandate in the above matter is hereby recalled. The mandate will remain stayed pending further order of the Supreme Court. [97-17232] (lp)

3/3/99 Received "fax" from Ann Hardgrove Voris for Appellant Lucio Flores Ortega with attached letter and order from the Supreme Crt. re: application to stay mandate is denied (faxed to PANEL) [97-17232] (lp)

3/4/99 Filed Ernest C. Roe motion for 3/1/99 Order to remain in effect pending certiorari proceedings; served on 3/3/99. (faxed to PANEL) [97-17232] [3640136] (lp)

3/11/99 Received copy of letter from Paul Edward O'Connor for Appellee Ernest C. Roe to District Court dated 3/10/99 re: request that Court stay Order granting conditional writ. (faxed to PANEL) [97-17232] (lp)

3/12/99 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 98-1441 filed on 3/4/99. Placed on the docket 3/10/99. [97-17232] (lp)

3/19/99 Received copy of letter from Paul Edward O'Connor for Appellee Ernest C. Roe to Superior Court dated 3/17/99 re: attached Order granting Conditional Writ. [97-17232] (lp)

3/23/99 Received fax from Ann Hardgrove Voris for Appellant Lucio Flores Ortega re: attached District Court Order staying action. (PANEL) [97-17232] (lp)

4/20/99 Received copy of Reply to Brief in Opposition (CASEFILE) [97-17232] (lp)

5/13/99 Received letter from the Supreme Court dated 5/3/99 re: the ct today entered the following order in the above entitled cases. The mtn of respondent for leave to proceed ifp is GRANTED. The petition for a writ of certiorari is GRANTED LIMITED to Question 2 presented by the petition. [97-17232] (rc)

5/25/99 Filed Ernest C. Roe unopposed motion to stay the mandate; served on 5/24/99. (faxed to Author) [97-17232] [3681692] (lp)

5/28/99 Filed Appellant Lucio Flores Ortega's non-opposition to Motion for Stay of Mandate; served on 5/24/99. (faxed to Author) [97-17232] (lp)

REPORTER'S TRANSCRIPT
CHANGE OF PLEA (ENTRY OF GUILTY PLEA)
OCTOBER 13, 1993

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

Before the Honorable Dwayne Keyes, Judge
Department 1
-o0o-

THE PEOPLE OF THE STATE OF CALIFORNIA, No. 490730-9

Plaintiff,

vs. REPORTER'S TRANSCRIPT

LUCIO ORTEGA FLORES,
Defendant. CHANGE OF PLEA

-o0o-

Fresno, California October 13, 1993

-o0o-

APPEARANCES:

FOR THE PEOPLE: EDWARD W. HUNT,
District Attorney of the County of Fresno
BY: MICHELE E. GRIGGS
Deputy District Attorney

FOR THE DEFENDANT: JOSE VILLARREAL,
Public Defender of The County of Fresno
BY: NANCY KOPS
Chief Defense Attorney

INTERPRETER: CHERYL SAUCEDA

-o0o-

Reported by:
VALERIE ELIZABETH FAUST, C.S.R., R.P.R.
CERTIFICATE NO. 4922

[START TRANSCRIPT - PAGE 2, LINE 1]
WEDNESDAY, OCTOBER 13, 1993 - AFTERNOON SESSION

(The following proceedings were had in open court in the presence of the Court, Counsel, defendant and the interpreter:)

THE BAILIFF: Please come to order. Superior Court, Department 1 is now in session.

THE COURT: All right. We are again on the record in Action 490730-9, People of the State of California vs. Lucio Ortego Flores.

Mr. Flores, it's my understanding that you wish to change your plea of not guilty to guilty; is that correct?

THE DEFENDANT: How is that?

THE COURT: You wish to change your plea from not guilty to guilty?

THE DEFENDANT: To plead guilty?

THE COURT: Yes.

THE DEFENDANT: Guilty of what?

THE COURT: You have talked to your attorney. You understand why we are here now. Do you wish to change your plea from guilty — from not guilty to guilty?

THE DEFENDANT: Well, I filled out a sheet. I thought that — I think that I signed that to plead guilty.

THE COURT: That is correct. I have to ask you questions in addition to that sheet.

Do you wish to change your plea from not guilty to guilty?

[TR. 3]

THE DEFENDANT: I wanted to change my pleas, but when I was asking the judge, I have a letter here for the judge asking him to give me a bilingual public defender.

THE COURT: I have already told you, you will not get a bilingual defender.

Do you wish to change your plea from guilty to not — pardon me — from not guilty to guilty?

THE DEFENDANT: Well, I already explained to the attorney that although I am not guilty, I have to plead guilty.

THE COURT: Is your answer yes?

THE DEFENDANT: Yes.

MS. KOPS: Your Honor, just for the record, when talking to Mr. Flores this morning, I did explain that he had a choice of whether to plead guilty or to have a jury trial, but I couldn't force him, and nobody could force him, to plead guilty, so that he did not have to plead guilty.

THE COURT: All right. Mr. Flores, we have a jury waiting downstairs to come up and hear this case. And you have a right to a speedy and public trial. Do you understand you have that right?

THE DEFENDANT: Yes, I have the right, but —

THE COURT: Go ahead.

THE DEFENDANT: I have the right, but I can't decide it because I do not have sufficient people to resolve this

[TR. 4]

problem.

THE COURT: You would really like to have your trial, wouldn't you, Mr. Flores?

THE DEFENDANT: Well, I would, but —

THE COURT: All right. Then we're going to bring up the panel.

THE DEFENDANT: But I haven't finished. I haven't finished explaining. I would, but seeing that I am alone, I am with the help of no one, it's better that I plead guilty.

THE COURT: Then I want you to answer the following questions. And I do not want to take two hours to do this. I'd just as soon you have your trial. Do you understand?

THE DEFENDANT: Okay.

THE COURT: You understand that if you plead guilty, you give up your right to a speedy and public trial?

THE DEFENDANT: How is that?

THE COURT: If you plead guilty, you give up your right to a speedy and public trial.

THE DEFENDANT: Okay.

THE COURT: There will be no trial if you plead guilty.

THE DEFENDANT: Okay.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You also have the right to have a trial by the Court, one judge. Do you understand that?

[TR. 5]

THE DEFENDANT: Okay.

THE COURT: And if you plead guilty, you give up that right. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Okay. You also have the right to be confronted by witnesses. That means that the prosecutor here will call witnesses that would take the stand and give their testimony. Do you understand?

THE DEFENDANT: Yes.

THE COURT: And your attorney would have the opportunity to cross-examine those witnesses. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Now, if you plead guilty, there would be no trial. And you would be giving up that

right of confrontation and the right to your Counsel to cross-examine.

THE DEFENDANT: How is that?

THE COURT: If plead guilty, there will be no trial. So there would be no witnesses to testify. There would be no witnesses for your attorney to cross-examine.

THE DEFENDANT: Yes. I already told her that although I did not do it, I have to plead guilty.

THE COURT: Do you understand there will be no trial?

THE DEFENDANT: Yeah.

THE COURT: And there will be no witnesses.

[TR. 6]

THE DEFENDANT: Yes.

THE COURT: You understand that you have the right to call witnesses in your behalf?

THE DEFENDANT: Yeah, I understand.

THE COURT: And if you plead guilty, then you would give up that right to call witnesses in your own behalf. Do you understand?

THE DEFENDANT: Yes.

THE COURT: And do you give up that right?

THE DEFENDANT: Yeah.

THE COURT: All right. You have the right against self-incrimination. And that means the right to remain silent. Do you understand you have that right?

THE DEFENDANT: Okay.

IS THE COURT: And you understand if you enter a plea of guilty, you give up that right?

THE DEFENDANT: Yeah.

THE COURT: And do you understand that in a jury trial, all 12 jurors would have to find beyond a reasonable doubt that you are guilty? Do you understand that?

THE DEFENDANT: I think so, because although there may be proofs, there may be proof, it's useless.

THE COURT: Do you understand that all 12 jurors would have to agree to your guilt beyond a reasonable doubt?

THE DEFENDANT: Well, since I did not know what a jury is, since I haven't been for many years in jail, I can't

[TR. 7]

decide whether they're giving me my liberty or more time, more years.

THE COURT: Do you want your jury trial?

THE DEFENDANT: No.

THE COURT: All right. Then do you understand that 12 people make up a jury?

THE DEFENDANT: Yes. I am understanding.

THE COURT: So you know what a jury trial is?

THE DEFENDANT: Now, I do, yes.

THE COURT: And you give up the right to those 12 people considering your guilt beyond a reasonable doubt?

THE DEFENDANT: Yeah. What can I say?

THE COURT: You can say either yes or no.

THE DEFENDANT: I don't know what the answer is.

THE COURT: I have the strange feeling, Mr. Flores, you're playing games with me. And I have run out of time. We're going to bring up the panel. And we're going to start the trial.

THE DEFENDANT: It's not that. My attorney should tell me what I should do or say, whether yes or no. She should tell me yes or no. These are words that I don't understand. Pleas forgive me. Well, if I'm to say yes to everything that is said to me, please, please. If she tells me to say okay or yes to no, I don't know.

THE COURT: You understand all 12 jurors have to find you guilty for you to be found guilty?

[TR. 8]

THE DEFENDANT: Why doesn't she tell me what it is I have to say? I really don't know.

THE COURT: Well, I'm asking you. You are the one that is going to prison. You're the one that has to make up your mind.

THE DEFENDANT: Well, I already said that I was going to plead guilty.

THE COURT: You have to answer certain questions. Do you understand that the prosecutor, the D.A., has to convince 12 jurors that you are guilty?

THE DEFENDANT: Who is the D.A.? She seems to be the defender of Felix Villalobos.

THE COURT: He is going to be a witness against you. You understand that 12 jurors have to find you guilty for you to be found guilty?

THE DEFENDANT: Please tell him that I'm pleading guilty.

THE COURT: You can't plead guilty until I am satisfied you really want to plead guilty.

THE DEFENDANT: Well, I'm saying that I am going to plead guilty.

THE COURT: You understand that 12 jurors have to find you guilty?

THE DEFENDANT: Yes.

THE COURT: And they have to do this beyond a reasonable doubt. That means beyond almost all doubt, not

[TR. 9]

quite, but beyond reasonable doubt. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, do you give up that right?

THE DEFENDANT: Yes.

THE COURT: Are you a citizen of the United States?

THE DEFENDANT: I'm a permanent resident.

THE COURT: Well, if you are not a citizen, you may be, upon — when you serve your time, you may be deported. If you are a permanent resident, I do not know the status.

MS. KOPS: My advice to Mr. Flores this morning is that he would be deported.

THE COURT: All right. After you serve your time, you will be deported. Do you understand?

THE DEFENDANT: What I am saying is that why am I — that why should I be deported if I have never committed a felony and I'm not a criminal either. I've always liked to work to support my family.

THE COURT: After you plead guilty and are sentenced, you will be a felon. Do you understand?

THE DEFENDANT: Okay.

THE COURT: Understanding you will be deported, do still wish to change your plea?

THE DEFENDANT: If I'm deported, I don't know. If I'm deported, what is going to happen with my family here?

THE COURT: I do not know.

[TR. 10]

THE DEFENDANT: Well, he can decide. I have my children here. My son is here. I was married here in the United States.

THE COURT: You will be deported. You still wish to change your plea?

THE DEFENDANT: Yeah.

THE COURT: All right. You understand that once you are released, if you are sentenced to prison, once you are released, you will be on parole for a period of five years —

Or is it life?

MS. KOPS: I think it can be up to life.

THE COURT: You will be on parole up to life. For the rest of your life, you will be on parole, which means you will have to obey all laws or you could be returned to prison.

THE DEFENDANT: Well, I don't know what it is, but it seems that I'm going to understand that.

THE COURT: It means you have to be a good person and obey all laws.

THE DEFENDANT: Yes. I have always obeyed them.

THE COURT: So you understand you will have to do that as a term of your parole from prison?

THE DEFENDANT: Yeah, yeah.

THE COURT: Have you — if you were to violate your parole, in other words, you weren't a good person and didn't

[TR. 11]

obey all laws, you might go back to prison for up to three years — one year for each violation. You understand?

MS. KOPS: Your Honor, I think on that type of parole, could be for longer possibly than a year, if it's a life parole. I think the rules might —

THE INTERPRETER: I am sorry. The interpreter interpreted three years for each violation.

THE COURT: All right. We can go back.

For a period to be determined by the Department of Corrections. So it's important that you be a good

person when you are released from prison. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Now, have you had an opportunity to talk to your lawyer about the case today?

THE DEFENDANT: Just for me to plead guilty to the years they're going to give me.

MS. KOPS: Your Honor, for the record, I believe, the interpreter and I talked to Mr. Flores this morning I would say at least for two hours. That would be my estimate.

THE COURT: That's my estimate, also.

MS. KOPS: And we left at 20 minutes to 1:00 for lunch. And I think we started at 9:30, quarter to 10:00. And we did discuss the case and the jury trial and everything that is on the form and what his different options were.

THE COURT: All right.

And are you pleading guilty, Mr. Flores, freely and

[TR. 12]

voluntarily?

THE DEFENDANT: Yes.

THE COURT: Now, you have been promised for your plea that the District Attorney, in return for your plea of guilty to Count l, which is murder in the second degree, as is the agreement, the District Attorney will dismiss the knife allegation enhancement and dismiss Counts 2 and 3. So has anybody made any promises to you beyond what I have just said in order to obtain your plea of guilty?

THE DEFENDANT: Promise?

THE COURT: In other words, the District Attorney has promised if you plead guilty, she is going to dismiss these other counts and the knife enhancement. Were any other promises made to you?

THE DEFENDANT: No.

THE COURT: All right.

MS. GRIGGS: Can you tell him what the term is for second degree murder?

THE COURT: And you understand that the term for second degree murder is 15 years to life?

THE DEFENDANT: Yes.

THE COURT: You understand that?

THE DEFENDANT: Yes.

THE COURT: Has anyone threatened you in order to obtain your plea of guilty?

THE DEFENDANT: Well, no. No. No one, but — but I

[TR. 13]

have to do it.

THE COURT: But nobody has threatened you?

THE DEFENDANT: No.

THE COURT: And, Counsel, do you believe you have had sufficient time to talk to your client about this plea, change of plea?

MS. KOPS: Yes.

THE COURT: And you have discussed with him his rights and his defenses and the consequences of the plea?

MS. KOPS: Yes.

THE COURT: And I do have the executed form of the change of plea. And is it — it has been signed and marked by the defendant. And you have gone over this form with your client this morning and into the noon hour?

MS. KOPS: Yes. And I do not believe, however, that the interpreter signed the form. I think we have to have that signed.

THE COURT: Okay. If the interpreter, please, would. There is a place here on the bottom line for you to sign, if you would do that.

(Thereafter, the interpreter signed the form.)

MS. KOPS: And in going over this change of plea form and all of the discussions I had with Mr. Flores, I, at all times, used the interpreter.

THE INTERPRETER: Your Honor, because of the nature of this, the interpreter would like to state, on the record,

[TR. 14]

that she has adhered very strictly to an interpretation of what the attorney said and what he said with — I did not break loose.

THE COURT: No editorials?

THE INTERPRETER: No editorials, Your Honor.

THE COURT: Do you consent to your client's change of plea?

MS. KOPS: Yes.

THE COURT: All right. Permission to withdraw the previously entered plea of not guilty is granted. And the plea is hereby withdrawn.

Mr. Flores, how do you plead to violation of Section 187 of the Penal Code, a felony, that alleges that on or about May 17th, 1993, you did willfully and unlawfully and with malice aforethought murder Gregorio Orduno Lopez, a human being? Guilty or not guilty?

THE DEFENDANT: That I did it?

THE COURT: That you did it is guilty.

THE INTERPRETER: I am sorry?

THE COURT: That you did it is guilty.

THE DEFENDANT: Well, I did not do it, but I'm pleading guilty.

THE COURT: Is your plea guilty?

THE DEFENDANT: Yeah.

THE COURT: So, Counsel, I understand that this plea is made under People vs. West; is that correct?

[TR. 15]

MS. KOPS: That is correct. And I did write on the form, the change of plea form. And I also went over with Mr. Flores, this morning, numerous times, the explanation that was given for his change of plea and that is that if he goes to trial, there was the risk that he could be found guilty of crimes for which he could receive more severe sentences. And this is the reason that Mr. Flores is pleading guilty.

THE COURT: And Counsel for the People — and I understand, also, that you will stipulate as far as the basis that the preliminary hearing would supply a basis for this.

MS. KOPS: Yes. And I also explained that to Mr. Flores.

MS. GRIGGS: The People so stipulate.

THE COURT: And I understand that you have a witness prepared to testify as to Count 2, that he was assaulted with a knife by Mr. Flores; is that correct?

MS. GRIGGS: That is correct.

THE COURT: And you have a witness who saw, at the scene of stabbing, that saw Mr. Flores with a knife on that occasion?

MS. GRIGGS: I do.

THE COURT: And you have a witness who saw motions being made toward the victim by Mr. Flores. I mean — yes. The victim by Mr. Flores.

[TR. 16]

MS. GRIGGS: And that as soon as that motion ceased, the victim fell to the ground and blood became apparent immediately on his clothing.

THE COURT: All right.

MS. GRIGGS: And also, with regard to Count 3, I have a witness who can testify that the defendant assaulted Gregorio Orduno Lopez with a knife on a separate occasion. That's being dismissed, but you were asking for my factual basis.

THE COURT: Right. That's right.
All right. So the defendant's plea of guilty and waiver of constitutional rights are accepted and will be entered on the minutes of the Court. The reporter is ordered to prepare and certify a transcript of these proceedings with the Clerk of the Court.

Is there anything else, prior to setting a date for sentencing, that should be stated on the record at this time, Counsel?

MS. KOPS: I can't think of any, Your Honor.

THE COURT: All right. Then Mr. Flores, I'm going to set the time for the report of the Probation Office and for sentence in this matter to Wednesday, November the 10th, at 8:30 in the morning, in this department. And you are remanded to the custody of the Sheriff.

MS. GRIGGS: For the record, Your Honor, if at all possible, I would ask that the RPO go on that date, because

[TR. 17]

very shortly thereafter, I will be unavailable.

THE COURT: Well, it's my hope that — how very shortly after that, assuming things go as they should?

MS. GRIGGS: My last day of work, I intend to be the 19th. But that's if, you know, if I'm able to really.

THE COURT: Now, do you have a motion?

MS. GRIGGS: Yes, Your Honor. The People move to dismiss Counts 2 and 3 in light of the defendant's plea and to strike the allegation of personal use of a deadly and dangerous weapon, under 12022(b) as it relates to Count 1.

THE COURT: Those motions are taken under advisement. I will rule upon those motions on November 10th, the date of sentencing.

MS. KOPS: Your Honor, also, consequences of the plea also, I believe, could include a fine. And I advised Mr. Flores this morning of that possibility. But I don't know how likely that is.

THE COURT: Well, Mr. Flores, there is a possibility that you could receive some type of fine. That means a monetary amount to be paid over some period of time by you. Do you understand that?

THE DEFENDANT: I am going to pay money and Jail?

THE COURT: Well, I don't know if you're going to do both. That's up to the Court. But that is possible. Some of it may be paid while you're in Jail.

THE DEFENDANT: Well, I'm of a poor family. And I work

[TR. 18]

in the fields. It's not very steady work. I would not be able to pay money. If you want to give me more jail, just give me more jail.

THE COURT: I thought you were selling ice cream.

THE DEFENDANT: No. Just during the hot season, that's all. I have been locked up for five months.

MS. GRIGGS: Can you tell him that you want him to understand that's a possibility?

THE COURT: It is a possibility. Do you understand?

THE DEFENDANT: Yeah.

THE COURT: All right. We are in recess.

(Recess taken at this time.)
(Thereafter, this matter was concluded.)

[END TRANSCRIPT - PAGE 18, LINE 13]

STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

I, VALERIE ELIZABETH FAUST, Certified Shorthand Reporter, do hereby certify that the foregoing pages comprise a full, true and correct statement of the proceedings as reflected therein.

DATED: Fresno, California
October 22nd, 1993

VALERIE ELIZABETH FAUST,
C.S.R., R.P.R.
OFFICIAL SHORTHAND REPORTER
CERTIFICATE NO. 4922

REPORTER'S TRANSCRIPT, RPO AND JUDGMENT
(SENTENCING HEARING)
NOVEMBER 10, 1993

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

Before the Honorable Dwayne Keyes, Judge
Department 1

-o0o-

THE PEOPLE OF THE STATE
OF CALIFORNIA, No. 490730-9
Plaintiff,

vs. REPORTER'S TRANSCRIPT

LUCIO ORTEGO FLORES,
Defendant. RPO AND JUDGMENT

-o0o-

Fresno, California November 10, 1993

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APPEARANCES:

FOR THE PLAINTIFF: EDWARD W. HUNT,
District Attorney for the County
of Fresno
BY: MICHELE GRIGGS
Deputy District Attorney

FOR THE DEFENDANT: JOSE VILLAREAL,
Public Defender of the County
of Fresno
BY: NANCY KOPS
Chief Defense Attorney

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-o0o-

Reported by:
VALERIE ELIZABETH FAUST, C.S.R., R.P.R.
CERTIFICATE NO. 4922

[START TRANSCRIPT - PAGE 2, LINE 1]
WEDNESDAY, NOVEMBER 10, 1993 - MORNING SESSION

(The following proceedings were had in
open court the presence of the Court,
Counsel, defendant and the interpreter:)

THE COURT: I will call Action 490730-9, People of the State of California vs. Lucio Ortego Flores.

If Counsel would state your appearance.

MS. KOPS: Nancy Kops present in court with Lucio Flores. He is also being assisted by the official court interpreter.

THE COURT: All right. The District Attorney is not here. We have gotten a call. The District Attorney will be late. But I other matters that I have to start at 9:00 o'clock. So I just can't wait.

(Thereafter, Michele Griggs, Deputy
D.A., entered the courtroom.)

THE COURT: Here we go. The District Attorney is here. So we will now —

This is the time set for the report of the Probation Department and for sentencing. Is there any — do you waive formal arraignment for sentencing?

MS. KOPS: Yes, Your Honor.

THE COURT: And is there any legal cause why sentencing cannot be pronounced this morning?

MS. KOPS: No, Your Honor.

THE COURT: Is there something you would like to say?

[TR. 3]

I will start with the District Attorney.

Is there anything you wish to state to the Court at

this time?

MS. GRIGGS: I would simply like to note that regarding the circumstances of the offense, the probation officer took that from the testimony of one single witness, which was Mr. Villalobos, the original target of Mr. Flores' wrath. I wanted the Court to know that there are two additional witnesses who saw the blows struck by the defendant. And that was not indicated in this report. And I wanted you to know that, in fact, this defendant was seen lunging toward the victim, and then blood was seen coming out of the victim's side.

THE COURT: And as I understand it, from all the evidence, the victim here, the deceased — there was another victim — the deceased was an innocent bystander.

MS. GRIGGS: Yes, he was.

There is no indication, from any facts I am aware of, that he was doing anything other than simply standing and observing the dispute between Mr. Villalobos and the defendant.

I also wanted to note that both Mr. Villalobos and the victim in this case had been targets of attack by Mr. Flores at other points during the day. Mr. Flores was a target of an attack at approximately 10:00 p.m. that night at a gas station. And earlier that day, in the park,

[TR. 4]

Mr. Flores had chased the victim with a knife over a dispute over territory in Roeding Park. So I wanted the Court to know that the facts as the People believe them to be are not this was a single, rash act, that it was the product of a long — long, meaning at least a period of 12 hours — simmering dispute perhaps, between both

the victim earlier in the day and then later, in the evening, by Mr. Flores.

THE COURT: All right. Thank you.

Counsel.

MS. KOPS: Yes, Your Honor.

I would like to ask the Court to consider a grant of probation in Mr. Flores' case. And as the Probation Office points out, there would have to be unusual circumstances. The unusual circumstances present in this case are the fact that Mr. Flores has a very insignificant prior record. He has one conviction for drunk driving. And he is an older individual. He is not a real young man. He also has a number of children. He has been working his entire life and supporting his children. I would characterize his activities, the activities that have been attributed to him on the day that this happened, as out of character for him.

Again, his record, the record or lack of a record speaks for itself.

Mr. Felix Villalobos himself was not a completely

[TR. 5]

innocent individual. The facts that were brought out at the preliminary hearing indicated that on the evening that this incident occurred, Mr. Villalobos had, to some extent, humiliated Mr. Flores in the presence of other co-workers. Mr. Felix Villalobos was, in a sense, the manager of this particular ice cream vendor business and, in the presence of other co-workers, had made some very negative statements about the fact that Mr. Flores came in late and that he was dumb or stupid, or something to that effect when, in fact, the reason Mr. Flores was late is that he was out selling, to the very last ice cream, what he had in his possession. The person who was killed here was, in effect, an associate of Mr. Villalobos. He had gone with Mr. Villalobos and a

couple of other individuals to the bar where this incident occurred. And they had been drinking, according to the testimony of Mr. Villalobos. There isn't any testimony indicating that the victim who died was anything other than standing around, but he was associated with Mr. Villalobos. And, in effect, there were a group of people standing around Mr. Flores when this happened, all associated with Mr. Villalobos, who had a gun at the time that this happened.

I would also emphasize the fact that Mr. Flores does suffer from some health problems. He has had health problems for a number of years. I don't know if he wants to explain any of them to the Court. But he did again mention

[TR. 6]

them to me yesterday, that he is in some degree of pain. But, primarily, I would argue for the reasons that he has no significant prior record and has been supporting children, this is completely out of character for him to engage in this type of violence. I would ask the Court to give those factors consideration in deciding what the sentence should be.

THE COURT: All right. Thank you, Counsel.

MS. GRIGGS: I would like to briefly respond.

With regard to Mr. Flores' record, there is an error in the probation report at page 4. It shows that Mr. Flores was arrested on a single occasion for battery and 1489 and was then convicted of driving under the influence. That is incorrect, according to CII. CII indicated that this defendant was arrested for battery on 2-21-90, as stated, and a 1489 and was convicted of battery on 3-15-90 and received a 30-day county jail sentence concurrent with a second sentence, which he received for driving under the influence. So there were actually two arrests. One was for battery, a crime of

violence. And he was convicted of both with a concurrent sentence. So there is some history at least of the defendant committing crimes of violence.

Now, the other thing is we do not really know whether this defendant has a history of violence or not, because he was born and raised in Mexico. And the first entry that is on the rap sheet is in 1976. So I do not think we can

[TR. 7]

conclude from that anything, one way or the other, other than the fact that when he was in this country, he was arrested on two separate occasions; once for an alcohol-related offense and one for battery.

I think looking at this entire day, however, illustrates that this defendant was not a peaceful individual. He was a person that resorted to the use of violence and weapons at the slightest provocation.

Earlier in the day, he had a completely unrelated dispute, apparently unrelated to any of the facts in this case, with the actual victim when they were both selling ice cream in Roeding Park. He became enraged. A yelling match ensued. He pulled out a knife, a knife as described by the victim — as described by a witness at the preliminary hearing that appears to be the murder weapon. He pulled that out and chased the victim through Roeding Park until the victim outran him or he got tired, or whatever. But he pulled a knife and threatened him with a knife. Later that evening, he had the verbal dispute which Counsel has characterized as a, I guess, berating him, which I wouldn't disagree with. And after that dispute, the defendant went across the street to a gas station and there assaulted Mr. Villalobos with a knife, including lunging at him with a knife. Mr. Villalobos picked up a garbage can to defend himself and then called the police. And there are facts — there

is a police

[TR. 8]

report in that incident. And those were the two, 245s that were dismissed pursuant to this plea. So the only facts that we can look to to decide what kind of person this defendant is, I think, are the facts that took place on that day. And on three very diverse occasions, each and every time he was angered, he pulled out a knife and he threatened people with it. So I don't think that we can conclude from that that he is a peaceful person or that this is necessarily aberrant behavior. I think he has illustrated by his behavior that he is, in fact, a very dangerous man. And I do not think probation is appropriate. And he took the life of a completely innocent, noncombatant for absolutely no reason. And I do not think that deserves probation.

THE COURT: Counsel, anything further you wish to say?

MS. KOPS: I don't have anything else, Your Honor

THE COURT: Mr. Flores, is there anything you wish to say to the Court prior to the imposition of sentence?

THE DEFENDANT: Yes, that Mr. Felix, when he was giving his testimony, said that I had had difficulties with that person; he had a person living in his house. And I had never seen that man either in the park. That day, Villalobos could not take him outside of town on the bus. So he was selling his ice cream there. And the other guy, too, the two of them stayed there. But I swear, and I give my word, that I did not have any knife. It's not true.

[TR. 9]

That's not true what they came and said in their false testimony.

Many people know me at the park. My wife used to sell cheese. And the only thing she would have was just a little knife for the cheese, to give a little taste of cheese. I had no knife at all, absolutely not in the car, hidden, nor in the belt. Because I was attacked one time by some black men with a gun. The police put me in the patrol car. They searched me well. I had nothing. I had nothing then either. I swear that that isn't true. That's what I have to tell Your Honor.

THE COURT: All right. Mr. Flores, I have considered the — first of all, I have a motion under submission. And that was the motion by the People to dismiss Counts 2 and 3 and to strike the personal use allegation of the deadly weapon as it related to Count 1. Those motions are granted.

In addition to the probation report, which I have considered, I did receive, this morning, a letter from the Victim Services, Victim/Witness Assistance Center. And they interviewed a Mr. Felix Montes, who was a friend of the deceased victim, Gregorio Lopez, age 32. Mr. Montes, who is also a victim in this case, stated he, Gregorio, the victim, was a nice person. We were very good friends." With regard to the defendant, Mr. Montes stated, "That kind of people should not be out on the street. He should get at least 25 years, because my friend didn't have any way to

[TR. 10]

defend himself." Mr. Montes added that he would be present at the sentencing. And Mr. Montes is not present, the record will reflect.

So that is the only other document I have received in addition to the probation report.

Counsel, I assume, did you get a copy of that?

MS. KOPS: Yes. And I did review the probation report with Mr. Flores yesterday.

THE COURT: All right. Mr. Flores, if the Court were to find that this is an unusual case and that justice would be best served if you were granted probation, then that would occur. But considering the factors in 413(c)(1) and (c)(2) the crime was one of violence. And you, obviously — the report and the basis for the plea show that you we armed, that the victim was not. The victim was a bystander in the wrong place at the wrong time.

The Court finds this is an extremely serious crime and a crime that presents you as a danger. And your application for probation is denied. You are sentenced to prison and to be committed to the Department — California Department of Corrections for the term of 15 years to life.

You will receive credits of 267 days; 178 actual, 98 good time/work time credits.

With regard to Government Code Section 13967, you will — I will impose a restitution fine of $1,000.

You may file an appeal 60 days from today's date with

[TR. 11]

this Court. If you do not have money for Counsel, Counsel will be appointed for you to represent you on your appeal.

Is there anything else that should be stated on the record at this time, Counsel?

MS. KOPS: I have nothing.

MS. GRIGGS: Nothing further, Your Honor.

THE COURT: You are remanded to the custody of the Sheriff to be delivered to the Department of Corrections, Mr. Flores.

We are in recess.

(Thereafter, this matter was concluded.)
[END TRANSCRIPT - PAGE 11, LINE 11]

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STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

I, VALERIE ELIZABETH FAUST, Certified Shorthand Reporter, do hereby certify that the foregoing pages comprise a full, true and correct statement of the proceedings as reflected therein.

DATED: Fresno, California

February 8th, 1994

VALERIE ELIZABETH FAUST,
C.S.R., R.P.R.
OFFICIAL SHORTHAND REPORTER
CERTIFICATE NO. 4922

CALIFORNIA COURT OF APPEAL
OPINION
FILED AUGUST 12, 1994

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

LUCIO FLORES ORTEGA, F021708

On Habeas Corpus. (Super. Ct. No. 490730-9)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus.

Lucio Flores Ortega, Petitioner, in pro per.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, and Derald E. Granberg, Deputy Attorney General, for Plaintiff and Respondent.

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*Before Stone (W.A.), Acting P.J., Dibiaso, J., and Harris, J.

STATEMENT OF FACTS

In this petition for writ of habeas corpus, petitioner raises issues regarding his failure to timely file a notice of appeal and request for certificate of probable cause from his 1993 felony conviction in Fresno County Superior Court. The conviction followed petitioner's entry of a plea of guilty.

DISCUSSION

Petitioner claims he does not understand English. Neither his appointed attorney nor his interpreter informed him at sentencing that the above mentioned documents must be timely filed. He claims his plea was involuntary because his attorney told him he would receive a 31/2 year term for second degree murder. Instead, he was sentenced to 15 years to life. He claims to have been pressured into a plea because the change of plea and sentencing occurred on the same day.

We requested a response from the Attorney General which was filed on July 13, 1994. Petitioner did not file a reply.

Judgment is rendered at the time it is orally pronounced. (*People v. Thomas* (1959) 52 Cal.2d 521, 529, fn. 3.) A notice of appeal must be filed within 60 days of the date of the rendition of the judgment. (Cal. Rules of Court, rule 31(a).) A criminal defendant has the burden of timely filing a notice of appeal, but the burden may be delegated to trial counsel. (*In re Fountain* (1977) 74 Cal.App.3d 715, 719.) However, this court is vested with discretion to grant a petitioner relief from default in timely filing a notice of appeal and/or request for certificate of probable cause as required under California Rules of Court, rules 31(a) and (d) and Penal Code section 1237.5.

There has developed a judicial policy that reasonable doubts as to the veracity of a petitioner's allegations in these matters are to be resolved in favor of the petitioner in order to protect the right of appeal, as well as the policy that this court's power to grant relief from default in these instances be liberally exercised so that in proper cases appeal rights will not be forfeited on technical grounds. (*Cf. People v. Rodriguez* (1971) 4 Cal.3d 73, 79; *see also In re Benoit* (1973) 10 Cal.3d 72, 89.)

In the present case, trial counsel did not file a notice of appeal or request for certificate of probable cause on petitioner's behalf. However, the reporter's transcripts provided by the Attorney General make clear pertinent facts.

First, contrary to petitioner's assertion, plea occurred almost one month prior to sentencing. Second, petitioner offered to change his plea during trial. An interpreter was present at the proceeding. The court admonished petitioner that deportation would result from entry of a plea of guilty of second degree murder, and that the term for second degree murder is fifteen years to life. Prior to the sentencing hearing, a probation report was completed. The probation officer recommended a term of 15 years to life. At sentencing, an interpreter was again present. Petitioner expressed no surprise or objection to the term imposed.

DISPOSITION

The petition for writ of habeas corpus is denied.

CALIFORNIA SUPREME COURT
ORDER DENYING WRIT OF HABEAS CORPUS
FILED JANUARY 18, 1995

ORDER DENYING WRIT OF HABEAS CORPUS

No. S042190

IN THE SUPREME COURT OF CALIFORNIA

IN RE LUCIO FLORES ORTEGA

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

Chief Justice

PETITION FOR WRIT OF HABEAS CORPUS FILED JULY 27, 1995

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

UNITED STATES DISTRICT COURT — District: Eastern District of California

Name: LUCIO FLORES ORTEGA — Prisoner No.: J-01040

Place of Confinement
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Name of Petitioner (includes name under which convicted)
LUCIO FLORES ORTEGA

V.

Name of Respondent (authorized person having custody of petitioner)
ERNEST C. ROE, Warden CSP-LAC

The Attorney General of the State of:
CALIFORNIA, DANIEL E. LUNGREN

PETITION

1. Name and location of court which entered the judgment of conviction under attack:
   Fresno County Superior Court,
   1100 Van Ness Avenue,
   Fresno, CA 93721 (Department #13)

2. Date of judgment of conviction:
   November 11, 1993

3. Length of sentence:
   15 years to life

4. Nature of offense involved (all counts):
   Second degree murder [California Penal Code section 187]

5. What way your plea? (Check one):
   (a) Not guilty
   (b) Guilty X
   (c) Nolo contedere

   If you entered a guilty plea to one count or indictment, and a guilty plea to another count or indictment, give details:

   _____

6. If you pleaded guilty, what kind of trial did you have?
   (Check one)
   (a) Jury
   (b) Judge only

7. Did you testify at trial?
   Yes No

8. Did you appeal from the judgment of conviction?
   Yes No X

9. If you did appeal, answer the following:

(a) Name of court:
(b) Result:
(c) Date of result and citation, if known:
(d) Grounds raised:
(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court:
(2) Result:
(3) Date of result and citation, if known:
(4) Grounds raised:

(f) If you file a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court:
(2) Result:
(3) Date of result and citation, if known:
(4) Grounds raised:

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes **X** No

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court:
California Court of Appeal, Fifth Appellate District
(2) Nature of proceeding:
Petition for writ of habeas corpus
(3) Grounds raised:
Ineffective assistance of counsel [failure to file

a timely notice of appeal]
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No **X**

(5) Result:
Petition for writ of habeas corpus denied
(6) Date of result:
August 12, 1994

(b) As to any second petition, application or motion give the same information:

(1) Name of court:
California Supreme Court
(2) Nature of proceeding:
Petition for writ of habeas
(3) Grounds raised:
Abuse of discretion/Appellate Court failure to grant relief from default in timely filing of appeal; (2) Ineffective assistance of counsel [failure to file timely notice of appeal]; (3) Ineffective assistance of counsel [coerced guilty plea]
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No **X**
(5) Result:
Petition for writ of habeas corpus denied
(6) Date of result:
January 18, 1995

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes **X** No
(2) Second petition, etc. Yes **X** No

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State any ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.
CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed if you have exhausted your state court remedies with respect to them. However, you should in raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against

double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which as unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Petitioner was denied effective assistance of trial counsel wherein, counsel failed to file timely notice of appeal.

Supporting FACTS (state *briefly* without citing cases or law):
Petitioner's trial attorney NANCY KOPS, had promised petitioner at the time of sentencing that she would timely file a notice of appeal on petitioner's behalf. Trial counsel did not alternatively instruct/inform petitioner of his right of appeal or how petitioner might otherwise perfect a notice of appeal in pro per.

B. Ground two:

Supporting FACTS (state briefly without citing cases or law):

C. Ground three:

Supporting FACTS (state briefly without citing cases or law):

D. Ground four:

Supporting FACTS (state briefly without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes No X

15. Give the names and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing:
Nancy Kops, Chief Defense Attorney,
Fresno County Public Defender,
2220 Tulare St., Suite 300, Fresno, CA 93721

(b) At arraignment and plea:
Nancy Kops, Chief Defense Attorney,
Fresno County Public Defender,
2220 Tulare St., Suite 300, Fresno, CA 93721

(c) At trial:

(d) At sentencing:

(e) On appeal:

(f) In any post-conviction proceeding:
Petitioner In Propia Persona

(g) On appeal from any adverse ruling in a post-conviction proceeding:
Petitioner In Propia Persona

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?
Yes No X

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes No X

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes No X

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

NEXT FRIEND PETITIONER

I declare under penalty of perjury that the foregoing is true and correct. Executed on

JUL 12 1995
(date)

Signature of Petitioner

LUCIO FLORES ORTEGA, J-01040
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Petitioner In Propia Persona

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA,	No. _____
Petitioner,	PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY; WITH
-vs-	MEMORANDUM OF POINTS AND
ERNEST C. ROE, Warden,	AUTHORITIES IN SUPPORT THEREOF
Respondent.	
_____	28 U.S.C. SECTION 2254

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
NEXT FRIEND PETITION

BYRON CHAPIN MYERS, E-26677
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620
Next Friend Petitioner

LUCIO FLORES ORTEGA, J-01040
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Petitioner In Propia Persona

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA,	Nc. _____
Petitioner,	PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN
-vs-	STATE CUSTODY; WITH
ERNEST C. ROE, Warden,	MEMORANDUM OF POINTS AND
Respondent.	AUTHORITIES IN SUPPORT THEREOF
_____	28 U.S.C. SECTION 2254

NEXT FRIEND PETITION

To the Honorable, The United States District Court for the Eastern District of California:

Petitioner, Lucio Flores Ortega, a person not sui juris, by and through a Next Friend,[1] and by this jointly verified petition, respectfully alleges as follows:

I.

INTRODUCTION

1. Petitioner, Lucio Flores Ortega, is a citizen of Mexico who, is currently confined in state prison in the custody of respondent.

2. Respondent, Ernest C. Roe, is the Warden of California State Prison at Los Angeles County in Lancaster, California. (hereinafter CSP-LAC.) Respondent, as Warden of CSP-LAC, has constructive custody of petitioner.

II.

PETITIONER IS UNLAWFULLY RESTRAINED

3. Petitioner is now actually, unjustly and unlawfully imprisoned and restrained of his liberty and detained under color of the authority of the State of California in the custody of respondent.

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1. [Because the Joint Appendix is a single, computer-generated document, the footnotes are numbered sequentially throughout the Joint Appendix. Thus, most footnote numbers in the Joint Appendix do not correspond to footnote numbers in the original source documents. However, at the beginning of each footnote, the Warden has indicated the corresponding footnote number in the original source document.]

[Footnote 1 of Petition.] Next friend, Byron Chapin Myers, pursuant to Federal Rules of Civil Procedure, Rule 17(c) and, Local Civil Rules of the Eastern District of California, Rule 202(a) has submitted a jointly filed motion, moving this Court to be duly appointed as a "next friend" on behalf of the petitioner herein.

4. Petitioner's imprisonment and detention are unlawful in that petitioner was denied the effective assistance of trial counsel wherein, attorney Nancy Kops, failed to file a timely Notice of Appeal on behalf of petitioner following his conviction for second degree murder, and/or use of a knife in violation of California Penal Code sections 187 and 12022, subdivision (b).

5. California State law provides defendants in criminal cases with the right to appeal under California Penal Code section 1237. Trial counsel's failure to timely file a Notice of Appeal on petitioner's behalf pursuant to the statutory time limits set forth in California Rules of Court, Rule 31(a), constituted ineffective assistance of counsel, whereas, California Penal Code section 1240.1, subdivisions (a) and (b), imposes a statutory duty on the part of trial counsel to file a timely Notice of Appeal.

6. Trial counsel's failure to file a timely Notice of Appeal on petitioner's behalf violates petitioner's Sixth Amendment right to the assistance of counsel, as well as, petitioner's Fourteenth Amendment right to due process under the United States Constitution.

III.

FACTS

7. On October 13, 1993, petitioner, Lucio Flores Ortega, was to have begun the jury selection process in Fresno County Superior Court in the matter of People of the State of California v. Lucio Flores Ortega, Case No. 490730-9. (R.T. p. 3.)[2]

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2. [Footnote 2 of Petition.] "R.T." refers to the Official Court Reporter's transcript prepared on February 8, 1994, which, reflected proceedings held on October 13, 1993 [Change of Plea].

8. On October 13, 1993, the same date petitioner was to have begun his jury trial, petitioner met with trial counsel and a court appointed interpreter that morning for approximately two (2) hours discussing petitioner's case. (R.T. p. 11.)

9. During the above-mentioned discussion petitioner was informed by his trial counsel, Nancy Kops, that she was wholly unprepared to proceed to trial in his matter, and vehemently urged petitioner to plead guilty for that reason. (See Exhibit "A", Affidavit of Petitioner, attached hereto and incorporated by reference.)

10. During the entire length of the discussion between petitioner and his trial counsel, petitioner had consistently and continually asserted his desire to have a trial and present witnesses in his defense. (Exhibit "A".)

11. Petitioner, after having discussed the matter at length on the morning of October 13, 1993, had been led to believe his attorney, that he would only serve three and one half years in state prison in exchange for his plea of guilty. (R.T. p. 11.) (Exhibit "A".)

12. The record as a whole[3] leaves grave doubt and uncertainty as to whether or not petitioner actually understood any significant portion of the proceedings to

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[Footnote 2 appears at the bottom of page 3 of Prisoner's Petition. There is no corresponding footnote number in the text of page 3. The Warden has inserted footnote 2 following the first citation to the Reporter's Transcript.]

3. [Footnote 3 of Petition.] Petitioner requests that this Court take judicial notice of the Reporter's Transcripts of the proceedings held on October 13, 1993, and, the proceedings held on November 10, 1993, pursuant to Federal Rules of Evidence, Rule 201(f). The Reporter's Transcript for both proceedings are attached hereto as Appendixes "ONE" and "TWO". Petitioner has never received a Transcript record of the preliminary hearing held in his case. As such, petitioner submits these appendices as constituting the entire record in his case, that is relevant to this action.

the extent that he was cognizant that he was waiving his fundamental rights to confrontation, compulsion of witnesses, presenting a defense, etc.

13. The record is silent, in that it lacks any mention that petitioner's plea was made "voluntarily" as well as, "knowingly".

14. Petitioner requested that his trial counsel, Nancy Kops, file a Notice of Appeal on his behalf. (Exhibit "A".)

15. Trial counsel, Nancy Kops, assured petitioner that she would file a Notice of Appeal on petitioner's behalf at the close of petitioner's sentencing on November 10, 1993. (Exhibit "A".)

IV.

PROCEDURAL HISTORY

16. On November 10, 1993, petitioner was advised by the sentencing court of his right to appeal, and, immediately thereafter, requested that his trial counsel file a Notice of Appeal. (R.T. 11/10/93 at pp. 10-11 [Appendix TWO].) (Exhibit "A".)

17. On or about March 24, 1994, petitioner having realized that his trial attorney had not filed a timely Notice of Appeal, submitted a Notice of Appeal and Request for Certificate of Probable Cause to the Fresno County Superior Court. (See Exhibit "B", Notice of Appeal/Certificate of Probable Cause, attached hereto and incorporated by reference.)

18. On or about April 8, 1994, the Fresno County Superior Court Clerk notified petitioner that his Notice of Appeal had been received but not filed, citing the expiration of the sixty-day statutory period for filing an appeal. The court also informed petitioner, that if he wished to pursue the matter any further, to contact the Fifth District Court of Appeals. (See Exhibit "C", Letter

of April 8, 1994, Fresno Superior Court, attached hereto and incorporated by reference.)

19. On or about June 1, 1994, petitioner filed a petition for writ of habeas corpus with a jointly filed Ex-Parte Motion for Leave to File a Belated Notice of Appeal in the California Court of Appeal, Fifth Appellate District. (See Exhibit "D", Ex-Parte Motion for leave to File a Belated Notice of Appeal, attached hereto and incorporated by reference.)

20. On August 12, 1994, the California Court of Appeal, Fifth Appellate District denied petitioner's petition for writ of habeas corpus. (See Exhibit "E", Opinion issued by the Court of Appeal, attached hereto and incorporated by reference.)

21. On or about September 10, 1994, petitioner filed a petition writ of habeas corpus in the California Supreme Court, alleging, inter alia, that the Fifth Appellate District Court of Appeal abused its discretion in failing to, grant relief from procedural default in light of the fact that petitioner's trial counsel failed to file a timely Notice of Appeal on his behalf. (See Exhibit "F", Petition for Writ of Habeas Corpus, California Supreme Court [at Ground One], attached hereto and incorporated by reference.)

22. On January 18, 1995, the California Supreme Court denied petitioner's writ of habeas corpus without issuing an opinion.[4] (See Exhibit "G", Supreme Court's denial, attached hereto and incorporated by reference.)

23. On or about June 13, 1995, petitioner approached this "next friend" in the prison law library at CSP-LAC to inquire about his defunct hopes of filing an appeal in his case.

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4. [Footnote 4 of Petition.] *See Lewis v. Borg*, 879 F.2d 697, 698 (9th Cir. 1989) [wherein, exhaustion requirement satisfied when state supreme court denied state habeas petition without comment].

24. After having gone over the tortured procedural history of petitioner's bid for appellate review, this "next friend", agreed to assist petitioner in his attempt to seek appellate review of the Superior Court judgment. (See Affidavit of "Next Friend" which accompanies the jointly filed Motion to be duly appointed "next Friend" [guardian ad litem].)

25. On June 19, 1995, petitioner, through a next friend, sent a letter of inquiry to trial counsel, Nancy Kops, formally inquiring as to why counsel failed to timely file a Notice of Appeal on petitioner's behalf. It was petitioner's desire to elicit a response as to the circumstances in counsel's failure to file the Notice of Appeal after having assured petitioner that she would do so. (See Exhibit "H", Letter of Inquiry to Trial Counsel, Nancy Kops, attached hereto and incorporated by reference.)

26. On June 29, 1995, next friend for petitioner received a letter of response from petitioner's trial counsel, Nancy Kops. In her response, trial counsel stated that she had no independent recollection of petitioner discussing a desire to file an appeal, relying on the fact that she had no notes in her file that such a conversation ever occurred. (See Exhibit "I", Response of Trial Counsel, Nancy Kops, attached hereto and incorporated by reference.)

27. Petitioner, having exhausted his state remedies as to counsel's failure to timely file his Notice of Appeal, by pursuing this matter to the state's highest court pursuant to U.S.C. section 2254(c), hereby petitions this Honorable Court on the grounds that his confinement violates the Sixth and Fourteenth Amendments to the United States Constitution.

V.

REQUEST FOR JUDICIAL NOTICE

28. Petitioner requests that this Court take judicial notice of the Petition for Writ of Habeas Corpus filed on behalf of another prisoner in the California Court of Appeal, Second Appellate District by next friend, Byron Chapin Myers, pursuant to Federal Rules of Evidence, Rule 201(b), (d) and (f). For cause, petitioner would show that the ruling of law as found in the above-mentioned petition in the Court of Appeal Case entitled *In re Torrence*, Case No. B084778, should have been applied by the Court of Appeal in petitioner's case as well. (See Appendix "THREE", Petition for Writ of Habeas Corpus, Court of Appeal, Second Appellate District, attached hereto and incorporated by reference.)

VI.

CLAIMS FOR RELIEF

29. The petition should be granted because petitioner was denied his right to effective assistance of counsel as guaranteed by Article I, Section 15 of the California State Constitution, and the Sixth Amendment to the United States Constitution in that petitioner's trial counsel, Nancy Kops, failed to file a timely Notice of Appeal on behalf of petitioner, her client. Under California law, trial counsel in this regard, has two statutory duties imposed by California Penal Code section 1240.1. Under section 1240.1, subdivision (a), the attorney must [p]rovide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal.

30. Petitioner contends, and hereby affirmatively alleges that, at the close of his sentencing proceeding

shortly after the sentencing court advised petitioner of his right to appeal, that he requested trial counsel to file a notice of appeal on his behalf, and additionally inquired of counsel: "Can this thing be fixed?" (referring to the guilty plea.) Trial counsel did assure petitioner at this point, that she would file a Notice of Appeal on his behalf.

31. The second duty imposed by statute is found under 1240.1, subdivision (b) which, requires that, trial counsel must file a timely Notice of Appeal when counsel feels that meritorious grounds exist and an appeal is in the defendant's best interests [or] when the defendant requests trial counsel to do so.

32. In this case, trial counsel led petitioner to believe that she intended to file a notice of Appeal within the sixty-day statutory period, and failing to do so, counsel violated her duty under section 1240.1, subdivision (b).

33. The petition should be granted because petitioner was denied due process of law as set forth in *United States v. Horodner*, 993 F.2d 191, 195 (9th Cir. 1993), in that trial counsel did not file a timely Notice of Appeal even after having been requested to do so by petitioner, and promising to do so of her own accord and volition.

VII.

PRAYER FOR RELIEF

WHEREFORE, petitioner prays that:

(1) That this Court issue a writ of habeas corpus or order to show cause why the writ should not be issued to respondent, to inquire as to the legality of petitioner's restraint, returnable before this Court, directing respondent to specifically admit, deny or otherwise respond to the allegations made herein;

(2) That this Court appoint counsel for petitioner pursuant to 18 U.S.C. section 3006A(g), wherein this Court has the inherent discretion to appoint counsel concerning matters brought pursuant to 28 U.S.C. sections 2241 and 2254;

(3) That this Court appoint a referee or master to conduct a hearing at which proof may be offered of any contested factual issues raised by the denial and traverse and to make recommendations to this Court concerning the proper determination of any factual issues presented;

(4) That this Court vacate the California Court of Appeals denial and remand the matter to the Court of Appeal for further proceedings, and;

(5) That this Court grant petitioner any further relief that this Honorable Court deems just and equitable in the interest of justice.

Respectfully submitted,

DATED: JUL 12 1995

LUCIO FLORES ORTEGA, J-01040
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Petitioner In Propria Persona

DATED: JUL 12 1995

BYRON CHAPIN MYERS, E-26677
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Next Friend Petitioner

VERIFICATION

I, Byron Chapin Myers, declare:

I am a next friend to petitioner herein. I have read the foregoing petition and know the contents thereof are true of personal knowledge, except as to matters cited to in the attached exhibits and the companion record they provide, all of which, inasmuch as they are represented to he true, I believe them to be true.

Pursuant to Rule 17(c) of the Federal Rules of Civil Procedure, I am making this verification jointly, and on petitioner's behalf because petitioner lacks the requisite academic skills, and does not possess the present ability to communicate fluently in the English language to the extent of filing meaningful pleadings to the Court.

Pursuant to 28 U.S.C. section 1746, I, Byron Chapin Myers, declare under penalty of perjury and the laws of the United States, that the foregoing is true and correct.

DATED: JUL 12 1995

BYRON CHAPIN MYERS
Next Friend Petitioner

DATED: JUL 12 1995

LUCIO FLORES ORTEGA
Petitioner In Propria Persona

MEMORANDUM OF POINTS AND AUTHORITIES

I

STATEMENT OF THE CASE

A. Nature of the Case.

Petitioner, Lucio Flores Ortega, seeks relief from the denial of his habeas corpus petition in state court alleging the ineffective assistance of trial counsel for failing to timely file a notice of appeal.

B. State Court Proceedings.

On October 13, 1991, petitioner entered a plea of guilty to second degree murder within the meaning of Penal Code section 187, on the advice of his trial counsel.

On November 10, 1993, petitioner was sentenced to state prison for a term of 15 years to life. At sentencing, petitioner was advised of his right to appeal the judgment. Petitioner's trial counsel promised to file the notice of appeal, on petitioner's behalf within the statutory time limits.

On or about June 1, 1994, petitioner filed a joint petition for writ of habeas corpus along with a belated notice of appeal and application for certificate of probable cause in the California Court of Appeal, Fifth Appellate District, alleging, inter alia, ineffective assistance of trial counsel for failing to file a timely notice of appeal.

On August 12, 1994, the Court of Appeal denied petitioner's petition for writ of habeas corpus. (Exhibit "E".)

On or about September 10, 1994, petitioner filed a petition for writ of habeas corpus in the California

Supreme Court, alleging, inter alia, that the Fifth Appellate District Court of Appeal abused its discretion in failing to grant relief from the procedural default occasioned by petitioner's trial counsel in failing to timely file a notice of appeal on his behalf. (Exhibit "F".)

On January 18, 1995, the California Supreme Court denied petitioner's writ of habeas corpus without an opinion or citation to case law. (Exhibit "G".)

ARGUMENT

II

INTRODUCTION

The right to petition for a Writ of Habeas Corpus antedates the Federal Constitution. (*Bushell's Case* (1677) 124 Eng.Rep. 1006.) Habeas Corpus is explicitly recognized in the Federal Constitution. (Article I, Section 11; Article VI, Section 10.)

Habeas corpus has often been referred to as the "great writ." It is deeply rooted in the common law and has played an important role in the historical struggle for liberty. (*Fay v. Noia* (1963) 372 U.S. 391, 399, *Wright v. West*, (1992) 112 S.Ct. 2482, 2486-90.)

III

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS TRIAL ATTORNEY HAD FAILED TO TIMELY FILE A NOTICE OF APPEAL ON PETITIONER'S BEHALF

A. Introduction.

The U.S. Supreme Court in *Powell v. Alabama* stated:

> "This Court has repeatedly recognized, in an often quoted phrase, that a criminal defendant 'requires the guiding hand of counsel at every step in the proceedings against him'." (*Powell v. Alabama*, (1932) 287 U.S. 45, 69.)

Claims of ineffective assistance of counsel are appropriately addressed in habeas corpus proceedings. *United States v. Laughlin*, 933 F.2d 786, 788 (9th Cir. 1991); *United States v. Daly*, 974 F.2d 1215 (9th Cir. 1992). Petitioner, Lucio Flores Ortega, was deprived of his Sixth Amendment right to the effective assistance of counsel.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. (*Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984). The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result. (*Strickland v. Washington*, *supra*, 466 U.S. 668, 634-37.)

Construed in the light of its purpose, the right entitles the defendant to more than just bare assistance

rather, the defendant is entitled to effective assistance, "reasonably competent assistance of an attorney acting as diligent conscientious advocate." *People v. Ledesma*, ( ) 43 Cal.3d 171, 215; *see also Strickland v. Washington*, *supra*, 466 U.S. 668, 686-89.)

A defendant, thus, has a right to expect that his counsel will undertake [o]nly those actions that a reasonably competent attorney would undertake and that before counsel undertakes to act at all, he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. (*Strickland v. Washington*, *supra*, 466 U.S. 668, 691.)

The analysis under *Strickland* has two components. First, petitioner must show that his lawyer rendered deficient performance by specifying acts and omissions which allegedly fell outside the wide range of professionally competent assistance. *Id.* at 687, 104 S.Ct. at 2064-66. Second, petitioner must demonstrate that the deficient performance prejudiced the defense. *Id.* at 687, 104 S.Ct. at 2064. That is, the petitioner must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine our confidence in the outcome. *Id.* at 694, 104 S.Ct. at 2068.

B. Trial Counsel's Performance Fell Below An Objective Standard of Reasonableness Under Prevailing Professional Norms

Petitioner concedes that counsel should be afforded a wide range of latitude when exercising his discretion among possible tactical alternatives relied upon in defending his client. However, when counsel's performance is assessed in light of failing to perform a

duty which, is statutorily required of all attorneys under similar circumstances, his performance can be weighed against prevailing professional norms without having to rely upon the deferential scrutiny of counsel's performance normally associated with a choice among possible tactical alternatives. Petitioner has alleged that trial counsel, Nancy Kops, has failed in her statutorily required duties to file a timely notice of appeal on petitioner's behalf within the express meaning of Penal Code section 1240.1, subdivision (b), thus, implicating the Sixth Amendment to the United States Constitution. Petitioner has alleged that California Penal Code section 1240.1, subdivision (b) requires that trial counsel must file a timely notice of appeal when counsel feels meritorious grounds exist and an appeal is in the defendant's best interest [or] when the defendant requests trial counsel to do so. (Petition at paragraph 31.) Petitioner's indigency at the time the notice of appeal should have been filed, qualified him for the appointment of counsel on appeal by law in California. Naturally, this would have relieved trial counsel of any further responsibility beyond the initial filing of the notice of appeal. This could have been facilitated by simply preparing a one-page Notice of Appeal on petitioner's behalf designating petitioner as pro per, allowing petitioner to just direct its service to the court clerk. (See the Notice of Appeal prepared by trial counsel on behalf of next friend, BYRON CHAPIN MYERS, attached hereto as Exhibit "J", and incorporated by reference.)

In assessing trial counsel's performance to that end, it is interesting to note that all of the litigation subsequent to petitioner's sentencing was all for want of a simple one-page notice, possibly one of the simplest pleadings known to the legal profession.

C. Petitioner Was PreJudiced By Counsel's Failings Under The "Strickland" Standard

The second component of the *Strickland* standard, commonly referred to as the "prejudice prong," is satisfied when, "absent counsel's errors, there is a reasonable probability of a more favorable outcome." (*Ledesma*, *supra*, at p. 218.) For the purposes of petitioner's allegations, a more favorable outcome would have been appellate review of Superior Court judgment resulting from his questionable guilty plea and its attendant circumstances, a right guaranteed him by California law, hence, protected by the Fourteenth Amendment to the United States Constitution.

Under the prejudice prong of *Strickland*, a "reasonable probability" is not a showing that "counsel's conduct more likely than not altered the outcome in the case," but simply "a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694.)

The conduct of petitioner's trial counsel, Nancy Kops, fell far below the minimum level of competence which is required to provide effective assistance and clearly this deficient performance prejudiced petitioner, because had trial counsel filed petitioner's notice of appeal in a timely manner, petitioner would have qualified for appointed counsel on appeal who, would have been in a far better position to challenge the lower court's judgment than petitioner. It cannot be said that trial counsel's omission (inaction) and the resulting harm caused petitioner from lack of appellate review was anything but substandard and deficient, and entirely inconsistent with, as well as irreconcilable with the substantial ends of justice.

CONCLUSION

Petitioner has exhausted all remedies available under California law in an effort to secure prompt determination of his constitutional claim.

WHEREFORE, for the reasons stated herein, petitioner prays that this Honorable Court issue a writ of habeas corpus granting the relief prayed for herein and for such other and further relief this Court deems just and proper.

Respectfully submitted,

DATED: JUL 12 1995

_____
LUCIO FLORES ORTEGA
Petitioner in Propia Persona

DATED: JUL 12 1995

_____
BYRON CHAPIN MYERS
Next Friend Petitioner

AFFIDAVIT OF PRISONER FILED JULY 27, 1995

LUCIO FLORES ORTEGA
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Petitioner in Propria Persona

UNITED STATES DISTRICT COURT
EASTERN DISTRICT COURT OF CALIFORNIA

LUCIO FLORES ORTEGA, Petitioner, -vs- ERNEST C. ROE, Warden, Respondent.	No. _____ AFFIDAVIT OF PETITIONER, LUCIO FLORES ORTEGA, IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

STATE OF CALIFORNIA,	)	AFFIDAVIT
	) ss.	OF LUCIO FLORES
COUNTY OF LOS ANGELES.	)	ORTEGA

I Lucio Flores Ortega, having first been duly sworn, deposes and affiates as follows:

I am over the age of eighteen (18) years, and I am duly competent to testify that:

1. I am the petitioner in the above-entitled case now before this Honorable Court.

2. I was represented in the criminal action entitled, People v. Lucio Flores Ortega, Fresno County

Superior Court Case Number 490730-9, by counsel or record, Nancy Kops, whose address is:

NANCY KOPS
Chief Defense Attorney
Fresno County Public Defender
2220 Tulare Street, Suite 300
Fresno, CA 93721

3. On October 13, 1993, while meeting with my appointed attorney through an interpreter, I continually emphasized my desire to plead not guilty to the charges pending against me due to my factual innocence.

4. My attorney, Nancy Kops, told me that having a trial was not a good idea because she was not ready to take my case to trial, and as a result, I could lose my case.

5. My attorney, Nancy Kops, told me during this same conversation that she had met with the prosecuting attorney and that if I admitted that I was guilty to the Court, I would only have to serve three and one half years in prison. But if I had a trial, I would lose for sure.

6. During the entire conversation with my attorney that morning, I kept telling her that I did not do the crime that I was being charged with, and that I did not understand why she wanted me to say I did. She (my attorney) told that there was no other choice, except to go to trial and lose my case.

7. I never wanted to say that I was guilty because I was not. I only told the Court that I was guilty because my attorney told me many times that I had no other choice, except to go to prison for a long time.

8. On November 10, 1993, when I was finished telling the court that I was guilty, against my will, I asked my attorney, Nancy Kops, "Can this be fixed", because I did not want to say I was guilty.

9. My attorney, Nancy Kops, told me that I had the right to appeal the judgment like the court said. I did not understand what an appeal was, so she explained that I could have a higher Court look at my case. She (my attorney) then told me that she would file the papers for that (a notice of appeal), and I thanked her for that.

10. After I discovered that my attorney, Nancy Kops, did not file my notice of appeal on time, I tried my best to file my own, but the Courts kept telling me that I was too late.

This document has been translated from my native language, and read back to me in the same. I believe it to be an accurate representation of my statements given herein.

Pursuant to 28 U.S.C. section 1746, I, Lucio Flores Ortega, declare under penalty of perjury and the laws of the United States that the foregoing is true and correct. Executed this date JUL 12 1995 at California State Prison at Los Angeles County in Lancaster, California.

LUCIO FLORES ORTEGA, J-01040
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Affiant

DECLARATION OF NANCY KOPS
DATED NOVEMBER 16, 1995

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief
Assistant Attorney General
ROBERT R. ANDERSON, Senior
Assistant Attorney General
J. ROBERT JIBSON, Supervising
Deputy Attorney General
PAUL E. O'CONNOR (State Bar # 170829)
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1300 I Street, Suite 1100
P.O. Box 944255
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(916) 324-5290

Attorneys for Respondent

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, No. CIV-F-95-5612-GEB-HGB

Petitioner,

vs

ERNEST C. ROE, DECLARATION OF NANCY KOPS

Respondent.

I, Nancy Kops, declare and if called to testify would so state:

I am over the age of eighteen (18) years, and I am duly competent to testify that:

1. I am deputy public defender employed by the Public Defender of Fresno County.

2. The Fresno County Public Defender represented the petitioner, Lucio Flores Ortega, in Fresno County Superior Court case number 490730-9, from May 1993 to November 10, 1993, when petitioner was sentenced. I was petitioner's chief defense attorney.

3. Petitioner pled guilty to second-degree murder on October 13, 1993. He pled guilty in a trial department, just prior to jury selection. A very experienced interpreter went over a change-of-plea form at length with petitioner. The judge who took the plea spent time reviewing the plea form with petitioner prior to accepting his plea. The district attorney dismissed two counts of felony assault with a deadly weapon in exchange for the plea.

4. I kept file notes on conversations that I had with petitioner from August 16, 1993, to November 10, 1993. There are no notes regarding petitioner making a request to file an appeal. It is my policy to make notes of such requests. I have no independent recollection of petitioner discussing a desire to file an appeal after he pled guilty. I recall that the interpreter and I spent quite a bit of time, prior to the plea, talking with petitioner about his options.

5. I did not promise to file a notice of appeal on petitioner's behalf.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 16, 1995

Nancy Kops
Deputy Public Defender

**ANSWER TO PETITION
FOR WRIT OF HABEAS CORPUS
FILED NOVEMBER 17, 1995**

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE H. WILLIAMSON, Chief Assistant
Attorney General
ROBERT R. ANDERSON, Senior
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Attorneys for Respondent

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, No. CIV. F-95-5612-GEB/HGB

Petitioner, ANSWER

-vs-

ERNEST C. ROE, Warden,

Respondent.

COMES NOW respondent Ernest C. Roe, Warden of the California State Prison-Los Angeles County, and moves that the application for writ of habeas corpus filed on July 27, 1995, be denied on the following grounds:

I

Petitioner Lucio Flores Ortega is duly and lawfully confined at the California State Prison, Los Angeles County, by virtue of a valid judgment of the Superior Court of the State of California, in and for the County of Fresno, Number 490730-9, entered November 10, 1993, upon his guilty plea and subsequent conviction for one count of murder. (Cal. Pen. Code, § 187(a).)[5]

II

On August 12, 1994, the California Court of Appeal, Fifth Appellate District, denied petitioner's petition for writ of habeas corpus.

III

On January 18, 1995, the Supreme Court of California denied petitioner's petition for writ of habeas corpus in S042190; consequently, petitioner has exhausted his state court remedies.

IV

On July 27, 1995, petitioner filed a federal petition for writ of habeas corpus, and on September 26, 1995, the district court filed its order directing respondent to file an answer to the petition. In this action, petitioner raises only one ground for habeas corpus review: ineffective assistance of counsel due to trial counsel's failure to timely file a notice of appeal.

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5. [Footnote 1 of Answer.] All further statutory references are to Deering's Annotated Code, 1974, and its 1995 pocket supplement, unless otherwise indicated.

V

Petitioner's application for writ of habeas corpus must be denied because petitioner has not met his burden of showing that trial counsel's assistance was ineffective. There is no evidence that he requested trial counsel to file a notice of appeal or that trial counsel believed there was an arguably meritorious ground for appeal.

VI

Upon information and belief, respondent denies the allegation in paragraph 3 of the petition that petitioner is unjustly and unlawfully imprisoned and restrained.

VII

Upon information and belief, respondent denies the allegations in paragraphs 4, 5, 6, and 29 of the petition that petitioner was denied effective assistance of counsel because his trial counsel failed to timely file a notice of appeal.

VIII

Upon information and belief, respondent denies the allegations in paragraph 9 of the petition and paragraph 4 of petitioner's affidavit that on October 13, 1993, the date that jury selection was to begin, petitioner's trial counsel informed petitioner that she (trial counsel) was unprepared for trial and advised petitioner that for that reason he should plead guilty.

IX

Upon information and belief, respondent denies the allegation in paragraph 10 of the petition and paragraph 3 of petitioner's affidavit that during the entire length of his October 13, 1993, discussion with trial counsel petitioner consistently asserted his desire to have a trial and present witnesses in his defense.

X

Upon information and belief, respondent denies the allegation in paragraph 11 of the petition and paragraph 5 of petitioner's affidavit that he was led to believe that he would only serve three and one-half years in state prison in exchange for his guilty plea.

XI

Upon information and belief, respondent denies the allegation in paragraph 5 of petitioner's affidavit that petitioner's trial counsel informed him that if he went to trial he would lose "for sure."

XII

Upon information and belief, respondent denies the allegation in paragraph of petitioner's affidavit that petitioner kept telling his trial counsel that he was innocent and did not understand why trial counsel wanted petitioner to say that he was guilty.

XIII

Upon information and belief, respondent denies the allegation in paragraph 6 of petitioner's affidavit that his

trial counsel replied that there was no alternative to pleading guilty except going to trial and losing.

XIV

Upon information and belief, respondent denies the allegation in paragraph 7 of petitioner's affidavit that he never wanted to say he was guilty because he was innocent.

XV

Upon information and belief, respondent denies the allegation in paragraph 7 of petitioner's affidavit that he told the court he was pleading guilty because his trial attorney told him many times that he had no other choice, except to go to prison for a long time.

XVI

Upon information and belief, respondent denies the allegation in paragraph 8 of petitioner's affidavit that his guilty plea was against his will.

XVII

Upon information and belief, respondent denies the allegation in paragraph 12 of the petition that the record leaves "grave doubt and uncertainty" as to whether petitioner understood the proceedings or understood that he was waiving various constitutional rights.

XVIII

Upon information and belief, respondent denies the allegation in paragraph 13 of the petition that the

record is silent on whether petitioner's guilty plea was entered "voluntarily" and "knowingly."

XIX

Upon information and belief, respondent denies the allegation in paragraphs 14, 16, 30, and 33 of the petition that petitioner requested that his trial counsel file a notice of appeal on his behalf.

XX

Upon information and belief, respondent denies the allegation in paragraphs 15, 30, and 33 of the petition and paragraph 9 of petitioner's affidavit that petitioner's trial counsel assured petitioner that she would file a notice of appeal on his behalf at the close of petitioner's November 10, 1993, sentencing hearing.

XXI

Upon information and belief, respondent denies the allegation in paragraph 29 of the petition that petitioner is entitled to relief on the grounds of ineffective assistance of counsel because appellant's trial counsel failed to file a notice of appeal.

XXII

Upon information and belief, respondent denies the allegation in paragraph 8 of petitioner's affidavit that on November 10, 1993, he told the trial court that his October 13, 1993, guilty plea was against his will.

XXIII

Upon information and belief, respondent denies the allegation in paragraph 30 of the petition and paragraph 8 of petitioner's affidavit that following the November 10, 1993, sentencing hearing, petitioner asked his trial counsel whether his guilty plea could be "fixed."

XXIV

Upon information and belief, respondent denies the allegation in paragraph 32 of the petition that petitioner's trial counsel led him to believe that she intended to file a notice of appeal on his behalf.

XXV

Upon information and belief, respondent denies the allegation in paragraph 32 of the petition that by failing to file a notice of appeal on petitioner's behalf, petitioner's trial counsel violated her statutory duty under Penal Code section 1240.1, subdivision (b).

XXVI

Upon information and belief, respondent denies the allegation in paragraph 33 that petitioner should be granted relief because he was denied due process of law as a result of trial counsel's failure to file a notice of appeal.

XXVII

Except as expressly admitted herein, respondent denies each and every allegation of the petition and the accompanying affidavit and specifically denies that any of petitioner's rights have been violated in any manner.

XXVIII

On the date this answer is filed, respondent will lodge with this Court all available transcripts of all pertinent proceedings.

WHEREFORE, respondent requests that the petition for writ of habeas corpus be denied.

DATED: November __, 1995

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON, Chief Assistant
Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

J. ROBERT JIBSON
Supervising Deputy Attorney General

PAUL E. O'CONNOR
Deputy Attorney General

Attorneys for Respondent

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

An information was filed in Fresno County Superior Court, in case number 490730-9, charging petitioner Lucio Flores Ortega with the following: in count one, with violating section 187 (murder); and in counts two and three with violating section 245 (assault with a deadly weapon). As to count one, the information also alleged a violation of section 12022, subdivision (b) (an enhancement for the personal use of a deadly weapon). (RT 10/13/93, 2, 12, 15, 16, 17.)[6]

On October 13, 1993, petitioner pled guilty to the murder count. (RT 10/13/93, 14.) The People moved to dismiss counts two and three (assault with a deadly weapon), and to strike the section 12022, subdivision (b), allegation of personal use of a deadly weapon. (RT 10/13/93, 17.) The trial court took this motion under advisement. (RT 10/13/93, 17.)

On November 10, 1993, the trial court granted this motion and sentenced petitioner to 15 years to life in state prison. (RT 11/10/93, 9, 10.) He also received 267 days of credit: 178 days for actual time and 89 days good time/work time. (RT 11/10/93, 10; Prob. Rpt., p. 8.) He was advised of his appeal rights. (RT 11/10/93, 10-11.)

Petitioner did not timely file a notice of appeal. On March 24, 1994, appellant attempted to belatedly file a notice of appeal. (Notice of Appeal, dated 3/24/94.) On April 8, 1994, the Clerk of the Fresno County Superior Court informed petitioner that his notice was not filed because it was untimely. (Letter of April 8, 1994, from Clerk of the Fresno County Superior

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6. [Footnote 2 of Answer.] "RT" refers to Reporter's Transcript.

Court.) On June 1, 1994, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, Fifth Appellate District, which included a motion for leave to file a belated notice of appeal. (Petition for Writ of Habeas Corpus, F021708, filed June 3, 1994.)

On August 12, 1994, the appellate court denied the petition. *In re Lucio Flores Ortega*, No. F021708 (Cal. Ct. App. 5th Dist., filed 8/12/94), p. 4. On September 18, 1994, petitioner filed a petition for writ of habeas corpus in the Supreme Court of California. (*In re Lucio Flores Ortega*, No. S042190 (Cal., filed 9/18/94). On January 18, 1995, this petition was denied. (Order Denying Writ of Habeas Corpus, No. S042190 (Cal., filed 1/18/95). On July 27, 1995, petitioner filed the present petition.

STATEMENT OF THE FACTS

On the evening of May 16, 1993, petitioner and a co-worker had a couple of altercations. Later that evening, the co-worker and some of the co-worker's friends went to petitioner's home, allegedly so the co-worker could talk with petitioner and repair their friendship. Petitioner was not home, so the co-worker and his friends went to a nearby bar. After 30-60 minutes they left the bar. One of the co-worker's friends saw petitioner in the bar's rear parking lot. An additional confrontation ensued, with petitioner brandishing a knife and the co-worker repeatedly firing a gun into the air. The co-worker and his friends decided to return home; at this point, they discovered that a member of their group (Gregorio Lopez) had been injured. Lopez was next to his truck bleeding from a wound to his side, and stated that petitioner stabbed him. Those were Lopez's final words. (Report and Recommendation of the Probation Officer, filed November 1, 1993, pp. 2-3.)

ARGUMENT

Petitioner asserts that his trial counsel rendered ineffective assistance by failing to timely file a notice of appeal, as per her promise. (Petition for Writ of Habeas Corpus, p. 5.) This contention is without merit.

Trial counsel's failure to preserve a defendant's appellate rights may constitute ineffective assistance of counsel. (*Lozada v. Deeds*, 498 U.S. 430, 432 (1991).)[7]

The reasonableness of trial counsel's conduct is determined or at least strongly influenced by the defendant's statements or actions. (*Strickland v. Washington*, 466 U.S. 668, 691 (1984).) Here, a declaration from petitioner's trial counsel indicates that she has no recollection of petitioner expressing a desire to appeal, nor do counsel's contemporaneous notes reflect such a wish. (Declaration of Nancy Kops, ¶ 4; see also letter from Nancy Kops, dated 6/26/95, Petitioner's Exhibit "I".) Trial counsel states that it is her policy to make notes of such requests. (Declaration of Nancy Kops, ¶ 4.) This indicates that petitioner did not make such a request. This eliminates one of the circumstances in which counsel has a duty to file a notice of appeal pursuant to Penal Code section 1240.1.

Further, petitioner's trial counsel states that she

---

7. [Footnote 3 of Answer.] Penal Code section 1240.1, subdivision (b), states when trial counsel has a duty to file a notice of appeal. It provides, in pertinent part:

"It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue such relief as may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal."

never promised to file a notice of appeal on petitioner's behalf. (Declaration of Nancy Kops, ¶ 5.)

In addition, the transcripts and other documents lodged with this answer indicate that there were no arguably meritorious grounds for an appeal, thus petitioner's trial counsel had no statutory duty to file a notice of appeal on his behalf. (See footnote 3, ante.) Further, these documents show that petitioner's present claim should not be believed as he has shown a willingness to make false allegations. For example, petitioner claims that he did not understand that he faced a sentence of years to life. (Petitioner's Affidavit, Exhibit "A", ¶ 5.) The reporter's transcript belies this claim.

Petitioner's change of plea to guilty to the offense of second degree murder was made on October 13, 1993, while a jury panel was waiting, and was pursuant to a bargain which secured for him a striking of an enhancement (personal use of a knife) and the dismissal of the two assault with a deadly weapon counts. (RT 22 10/13/93, 17.) The transcript of the change of plea discloses that the court felt that petitioner was "playing games with me," that the court was willing to try petitioner, and that petitioner pled guilty despite this. (RT 10/13/93, 4, 7, 8, 14.) Petitioner entered his plea of guilty with a full understanding that the penalty for second degree murder was from 15 years to life in state prison, that he would be deported after he was released from state prison, and that he would be on parole for the remainder of his life. (RT 10/13/93, 9-12.) Moreover, the probation report prepared for petitioner's sentencing spelled out that petitioner's sentence would be from 15 years to life in state prison. (Prob. 5 Rpt., p. 8.) Finally, when petitioner was sentenced on November 10, 1993, petitioner voiced no surprise or objection when the court imposed the sentence of from 15 years to life in state prison. (RT 11/10/93, 10.)

The court transcripts enclosed with this answer effectively rebut petitioner's claim that he did not understand that he would be sentenced to 15 years in state prison. (*See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977); *Chizen v. Hunter*, 13 809 F.2d 560, 562 (9th Cir. 1986).) This indicates that petitioner is not a credible affiant. His claim that trial counsel promised to file a notice of appeal should therefore not be believed. Further, these transcripts indicate that there were no arguably meritorious grounds for an appeal. Thus, petitioner's trial counsel did not render ineffective assistance of counsel by failing to file a notice of appeal. Accordingly, the Attorney General respectfully submits that the petition for writ of habeas corpus should be denied.

DATED: November __, 1995

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California

—

GEORGE WILLIAMSON, Chief Assistant
Attorney General

PAUL E. O'CONNOR
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY MAIL

Re: Ortega v. Roe No.: F-95-5612

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

ANSWER

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

LUCIO FLORES ORTEGA (J-01040)
Centinela State Prison
P.O. Box 921
Imperial, CA 92251

Each said envelope was then, on November 15, 1995, sealed and deposited in the United States mail in Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 15, 1995, at Sacramento, California.

_____
DECLARANT

ORDER APPOINTING FEDERAL DEFENDER TO REPRESENT PRISONER FILED JULY 12, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, Petitioner,

v.

ERNEST C. ROE, Respondent.

CV F-95-5612 GEB HGB P

ORDER

Petitioner is a state prisoner proceeding pro se and in forma pauperis with this 28 U.S.C. § 2254 application for writ of habeas corpus. After reviewing the case file, it appears that an evidentiary hearing is necessary, solely on the credibility of petitioner's assertions that trial counsel promised to file a notice of appeal on his behalf. In light of that finding, the court has determined that the interests of justice require appointment of counsel. *See* 18 U.S.C. § 3006A(a)(2)(B); *see also Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983).

Accordingly, THE COURT HEREBY:

1. APPOINTS the Federal Defender to represent petitioner;

2. ORDERS the Clerk of the Court to copy the contents of this file and forward it to the Federal Defender;

3. SETS an evidentiary hearing for Friday, November 1, 1996, at 10:00 AM in a Fresno courtroom to be announced. Any objections shall be filed within 30 days of the service date of this order. The court will issue the orders necessary for the appearance of petitioner at the evidentiary hearing at the appropriate

time (and after the expiration of time allotted for objections).

DATED: July 12, 1996

Hollis G. Best,
UNITED STATES MAGISTRATE JUDGE

DECLARATION OF NANCY KOPS
DATED SEPTEMBER 30, 1996

CHARLES P. DREILING
ACTING PUBLIC DEFENDER
COUNTY OF FRESNO
2220 Tulare Street, Suite 300
Fresno, California 93721
Telephone: 488-3546

Attorney for Defendant
Nancy Kops/PD0027

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, No. CIV-F-95-5612-GEB-HGB

Petitioner,

vs. DECLARATION OF NANCY KOPS

ERNEST C. ROE,

Respondent.

I, Nancy Kops, declare and if called to testify would so state:

I am over the age of eighteen (18) years, and I am duly competent to testify that:

1. I am a deputy public defender employed by the Public Defender of Fresno County.

2. The Fresno County Public Defender represented the petitioner, Lucio Flores Ortega, in Fresno County Superior Court case number 490730-9, from May 1993

to November 10, 1993, when petitioner was sentenced. I was petitioner's chief defense attorney.

3. Petitioner pled guilty to second-degree murder on October 13, 1993. He pled guilty in a trial department, just prior to jury selection. A very experienced interpreter went over a change-of-plea form at length with petitioner. The judge who took the plea spent time reviewing the plea form with petitioner prior to accepting his plea. The district attorney dismissed two counts of felony assault with a deadly weapon in exchange for the plea.

4. I kept file notes of conversations that I had with petitioner from August 16, 1993 to November 10, 1993. My notes reflect that I spoke with petitioner on just one occasion between the day he pled guilty (October 13, 1993) and the day he was sentenced (November 10, 1993). My notes reflected that on that occasion, November 9, 1993, I had a twenty-minute interview with petitioner at the jail. I reviewed the probation officer's sentencing recommendation with petitioner. Petitioner was eligible for a grant of probation. However, the probation officer recommended denying probation. It is possible that I told petitioner that he could file of appeal of the sentence if the court sentenced him to prison. It is possible that petitioner said he would want to file an appeal if he was denied a grant of probation. I have no independent recollection of such a conversation. I would not necessarily have made any notations in my file about such a conversation.

If petitioner had told me on November 9 that he wanted to withdraw his guilty plea, such a conversation would have been of significant importance, and I feel that I would have made a notation in my file reflecting such a conversation. I have no memory of such a conversation and there are no notes reflecting such a conversation.

5. I wrote the words "Bring appeal papers" on the front page of the probation report that I reviewed with petitioner on November 9. It is possible that wrote I those words without actually discussing an appeal with petitioner. I remember that in a number of cases which I handled, I wrote "Bring appeal papers" as a memo to myself to remind myself to put the appeal papers in my file before going to the sentencing hearing. I have no independent recollection of whether I wrote those words on petitioner's probation report as a memo to myself or because we discussed filing an appeal.

6. I feel quite certain that if petitioner had told me on November 9 that he wanted to withdraw his plea, I would have brought that to the court's attention on November 10 prior to the court sentencing petitioner. A review of the reporter's transcript of petitioner's sentencing hearing reflects that I did not make a motion on behalf of petitioner to withdraw his plea. This transcript also shows that I argued for a grant of probation, and that I had reviewed the probation report with petitioner the previous day.

7. My file notes do not reflect any conversation with petitioner on November 10 regarding filing an appeal of his sentence. It is possible that there was such a discussion, but I have no memory of it. I believe that if petitioner had told me in court on November 10, 1993, prior to pronouncement of sentence, that he wished to withdraw his plea, I would have made a statement to the court on the record that petitioner wished to withdraw his guilty plea. I believe that if petitioner had told me after pronouncement of sentence that he wished to withdraw his plea, I would have gone to the jail to discuss this matter with him shortly thereafter.

My file notes do not reflect any other communication with petitioner after November 10, 1993. I do not believe that I had any discussion with petitioner

after November 10, 1993, in which I promised to file a notice of appeal on his behalf.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed at Fresno, California, this 30th day of Sept., 1996.

Nancy Kops
Chief Defense Attorney
Public Defender's Office
of Fresno County

WARDEN'S PRE-HEARING BRIEF
FILED JANUARY 10, 1997

DANIEL E. LUNGREN
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ROBERT R. ANDERSON
Senior Assistant Attorney General
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Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA,	CIV-F-95-5612-GEB-HGB
Petitioner,	**RESPONDENT'S PRE-HEARING BRIEF**
-vs-	Hearing: January 24, 1997
ERNEST C. ROE, Warden,	Time: 10:30 a.m.
	Judge: Hon. Hollis G. Best
Respondent.	

Pursuant to this Court's order filed November 1, 1996, an evidentiary hearing has been scheduled in the

above-entitled matter for January 24, 1997, at 10:30 a.m. in Courtroom 3, United States District Court, Eastern District of California, Federal Building, 1130 "O" Street, Fresno, California.

Pursuant to this Court's order filed July 12, 1996, this hearing is limited to the sole issue of the credibility of petitioner's assertions that trial counsel promised to file a notice of appeal on his behalf.

In his petition(s), petitioner asserts that his trial counsel, Fresno County Deputy Public Defender Nancy Kops, promised to file a notice of appeal on his behalf.[8] Form Petition, p. 5, ¶ 12A; Petition/MPA, p. 4, ¶ 15; pp. 8-9, ¶ 30; p. 12. In an affidavit, attached to his petition(s), petitioner makes the same assertion. Petitioner's Affidavit, p. 3, ¶ 9. Petitioner asserts that trial counsel made this promise at the time of sentencing. Form Petition, p. 5, ¶ 12A; Petition/MPA, p. 4, ¶ 15 (promise made at close of sentencing on November 10, 1993); Petition/MPA, pp. 8-9, ¶ 30 (assurance given at close of sentencing); Petition/MPA, p. 12 (promise given at November 10, 1993, sentencing hearing); Petitioner's Affidavit, pp. 2-3, ¶ 8-9 (on November 10, 1993, trial counsel said she would file notice of appeal).

Petitioner's uncorroborated assertions are not sufficient to sustain his claim of ineffective assistance of counsel. Under *Strickland v. Washington*, 466 U.S. 668 (1984), counsel is presumed to have rendered effective

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8. [Footnote 1 of Warden's Pre-Hearing Brief.] Petitioner has filed two petitions in this case. One is a six-page form petition asserting his claims in a perfunctory fashion; this was filed July 27, 1995. The other is a typewritten, eighteen-page document which includes a memorandum of points and authorities; this bears no filing date, but appears to have been filed with the first petition. The first petition will be denominated "Form Petition," the second, "Petition/MPA."

assistance. *Id.* at 689. It is the petitioner who must overcome this presumption. *Id.*

The Ninth Circuit has held that "prejudice is presumed under *Strickland* if it is established that counsel's failure to file a notice of appeal was without the petitioner's consent." *Lozada v. Deeds*, 964 F.2d 956, 958 (9th Cir. 1991). *See also United States v. Stearns*, 68 F.3d 328, 330 (9th Cir. 1995); *United States v. Horodner*, 993 F.2d 191, 195 (9th Cir. 1993). Indeed, the Ninth Circuit has stated that, "[w]e see no principled way to distinguish a failure to file a notice of appeal after a judgment following a plea from a failure to file after a judgment following a trial." *Stearns*, 68 F.3d at 330.

Moreover, in *Stearns* the Ninth Circuit also stated that the issue is whether petitioner "consented to the failure to file a notice of appeal, rather than . . . whether counsel ignored an explicit request to file." *Stearns*, 68 F.3d at 330. But see *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) ("'Request' is an important ingredient in this formula. A lawyer need not appeal unless the client wants to pursue that avenue."); *see also United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993); *United States v. Davis*, 929 F.2d 554, 557 (10th Cir. 1991); *Abels v. Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990). Respondent submits that Castellanos states the better rule: under the *Stearns* rule, defense counsel will be forced to file a notice of appeal whenever a defendant fails to expressly forego an appeal, regardless of the circumstances. Nevertheless, even under the *Stearns* rule, petitioner's contention fails.

Petitioner must still show that he did not consent to the failure to file. *Stearns*, 68 F.3d at 330. A recent district court opinion from the Eleventh Circuit is instructive. Although *United States v. MacFarlane*, 881 F.Supp. 562 (M.D. Fla. 1995), does not follow *Stearns* with respect to the asserted lack of distinction between

conviction by plea (id. at 565-566), it contains a persuasive discussion of credibility issues analogous to those at bar. In *MacFarlane*, the petitioner asserted that his trial counsel disregarded his instructions to file an appeal.[9] Trial counsel was unable to respond to petitioner's assertions as he died before the evidentiary hearing. *Id.* at 566. Nevertheless, the court reviewed, inter alia, the entry of plea ("rearraignment") transcripts. *Id.* at 566-568. These transcripts belied petitioner's claim of ineffective assistance and his assertion that he was confused at the time he entered his plea. *Id.* at 568, 569.[10] Moreover, the *MacFarlane* court stated:

> The impropriety pleaded as to the failure of [petitioner's trial counsel] to file an appeal is so basic that it strains credulity to believe that the defendant did not know immediately that his request had not been acted upon or that he could not have gained the knowledge by the exercise of reasonable diligence, allowing him to raise this issue at an earlier date and certainly prior to [trial counsel's] death some three years following the sentencing date. *MacFarlane*, 881 F.Supp. at 569.

Likewise, here the failure that petitioner alleges is so basic that it strains credulity to believe that petitioner did not know immediately that his request had not been acted upon. At sentencing, petitioner was advised that

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9. [Footnote 2 of Warden's Pre-Hearing Brief.] MacFarlane made this assertion for the first time some five years after he entered his guilty plea. *MacFarlane*, 881 F.Supp. at 564, 566.

10. [Footnote 3 of Warden's Pre-Hearing Brief.] Further, in these transcripts petitioner stated, inter alia, that he was satisfied with trial counsel's performance. *MacFarlane*, 881 F.Supp. at 567.

he had sixty days in which to file an appeal, and was informed that if he was indigent, counsel would be appointed to represent him. Reporter's Transcript, RPO and Judgment, 11/10/93, pp. 10-11.[11] It strains credulity to believe, as petitioner asserts, that it was not until March 24, 1994, some four-and-one-half months after sentencing, that petitioner realized his requested notice of appeal had not been filed. Petition/MPA, p. 5, ¶ 17.

Further, as noted in respondent's answer, various trial court documents lodged with this Court belie petitioner's assertion that he did not understand that he faced a fifteen-year-to-life sentence when he entered his plea. Compare Petitioner's Affidavit, p. 2, ¶ 5, with Reporter's Transcript, Change of Plea, 10/13/93, p. 12;[12] Probation Report, p. 8. This indicates that petitioner is not a credible affiant. *See, e.g., Marone v. United States*, 10 F.3d 65, 66 (2d Cir. 1993) (upholding district court finding that trial counsel was more reliable than petitioner because throughout the prosecution petitioner had constructed fact scenarios at odds with the evidence). Petitioner's claim that trial counsel promised to file a notice of appeal on his behalf should therefore not be believed.

Moreover, petitioner asserts that trial counsel promised to file a "notice of appeal" on his behalf. Form Petition, p. 5, ¶ 12A; Petition/MPA, p. 4, ¶ 14-15; Petition/MPA, pp. 8-9, ¶ 30; Petition/MPA, p. 12; Petitioner's Affidavit, p. 3, ¶ 9. However, in order to challenge the validity of petitioner's plea, trial counsel

11. [Footnote 4 of Warden's Pre-Hearing Brief.] This Reporter's Transcript was lodged with respondent's answer. Hereafter it will be designated "RT 11/10/93."

12. [Footnote 5 of Warden's Pre-Hearing Brief.] This transcript was lodged with this Court when respondent filed his answer. Hereafter it will be designated "RT 10/13/93."

would have been required to seek a certificate of probable cause pursuant to California Penal Code section 1237.5. Indeed, petitioner asserts that in March 1994, when he submitted a notice of appeal, he also requested a certificate of probable cause. Petition/MPA, p. 5, ¶ 17. Petitioner's failure to assert that there was any discussion with trial counsel about obtaining a certificate of probable cause belies his assertion that an appeal was discussed.

Trial counsel's declaration of September 30, 1996, further supports respondent's position.[13] This declaration states that if petitioner had told trial counsel on the day of sentencing (November 10, 1993), prior to pronouncement of sentence, that he wanted to withdraw his plea, trial counsel would have made a statement to the court on the record reflecting this. Exhibit A, p. 3, ¶ 7. Further, the declaration states that if petitioner had told her after pronouncement of sentence that he wished to withdraw his plea, trial counsel would have gone to the jail to discuss the matter with him shortly thereafter. Exhibit A, p. 4, ¶ 7.

13. [Footnote 6 of Warden's Pre-Hearing Brief.] This declaration had been attached as "Exhibit A." Further, a memorandum concerning a recent telephone conversation between respondent's counsel and trial counsel has been attached as "Exhibit B." While trial counsel acknowledges an inconsistency between her 1995 and 1996 declarations, most of her statements are consistent with her prior declarations. Moreover, some of the trial counsel's statements strengthen respondent's position. For example, trial counsel's statement that if she had promised to file a notice of appeal she would have done so. Or her statement that she does not recall any discussions regarding a certificate of probable cause. In addition, trial counsel states that if petitioner wanted to file a notice of appeal, then on the day of sentencing, trial counsel would have had petitioner sign the appeal papers, or if she did not have appeal papers with her, she would have brought them to the jail.

Further, trial counsel's lack of recollection concerning appeal-related discussions does not entitle petitioner to relief. *See, e.g., Hams v. Pulley*, 885 F.2d 1354, 1368 (9th Cir. 1988) (attorney's failure to introduce mental defense evidence could have been a thoughtful, tactical decision; petitioner's ineffectiveness claim fails despite counsel's lack of recall); (*Rhodes v. Estelle*, 582 F.2d 972, 973-974 (5th Cir. 1978) (petitioner's uncorroborated testimony as to the actions of his attorneys did not meet his evidentiary burden despite the death and lack of recall of pertinent witnesses); *Thomas v. Newsome*, 646 F.Supp. 583, 588 (M.D. Ga. 1986) (despite attorney's lack of recall of petitioner's statements, district court credited him over petitioner).

The declaration of the trial court interpreter also supports respondent's position.[14] The interpreter's inability to recall (1) petitioner requesting that trial counsel file a notice of appeal, or (2) trial counsel promising to file such a notice, provides some corroboration that no such statements were made. Exhibit C, p. 2, ¶ 6.

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14. [Footnote 7 of Warden's Pre-Hearing Brief.] Attached as "Exhibit C." Respondent has only a photocopy of the interpreter's declaration. Respondent has mailed a new, unsigned declaration to the interpreter for her signature. This declaration is identical to the one already signed and attached.

Petitioner will not be able to meet his burden of showing that trial counsel promised to file a notice of appeal on his behalf. His claim of ineffective assistance of counsel shall therefore fail.

Dated: January 9, 1997.

Respectfully submitted,

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TRANSCRIPT OF PROCEEDINGS,
EVIDENTIARY HEARING ON JANUARY 24, 1997,

[START OF TRANSCRIPT - PAGE 33, LINE 9]

NANCY KOPS, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please state your name for the record and spell your last name.
THE WITNESS: Nancy Kops, K-o-p-s.
MS. SPEAKER: Your Honor —
THE CLERK: Please have a seat.
MS. SPEAKER: — I'm also a witness in this case. Should I not be present?
MS. VORIS: I have no objection to her presence.

DIRECT EXAMINATION

BY MS. VORIS:
Q. Ms. Kops, where do you work?
A. For the Fresno County Public Defender's Office.
Q. And were you so employed in 1993?
A. Yes.
Q. Did you represent Mr. Flores Ortega?
A. Yes, I did.

[TR. 34]

Q. And what was the — what crime were you representing him on?
A. There were actually three crimes. There was a charge of murder. There was another charge of — or there were two charges of assault with a deadly weapon. So there were a total of three charges.

Q. Was — did Mr. Ortega have some difficulty in understanding the proceedings?
A. Which proceedings?
Q. The sentence — the entire proceedings?
Did you have difficulty communicating with him during the pendency of his case?
A. I would say I did not have difficulty — well, strike that. Let me rephrase that.
I would have difficulty in getting responses to the questions that I asked of him.
Q. What is your office policy, if there is one, regarding appeals in murder cases?
A. I don't know — I can't say that there is an office policy.
Certainly, if — I would say my own policy — do you want my own policy?
Q. Yes.
A. If a person went through a trial, I think I would file an appeal in all cases of a murder conviction as the result of a

[TR. 35]

verdict of guilty on a murder case.
With respect to a guilty plea, personally, if a defendant, after having entered a plea of guilty were to tell me that he wanted to withdraw his plea of guilty, I would bring that to the Court's attention before sentencing.
Q. We're not talking about —
A. Are you —
Q. — a withdrawal —
A. No.
Q. — of a plea.
A. Okay.
Q. I'm talking about an appeal. If the —
A. Of the sentence?

Q. An appeal.
A. Well, there would be two aspects, in my opinion, of the appeal. One would be the appeal of the plea, the entry of the plea itself. If the defendant — that would be one portion of an appeal. If a defendant had pled guilty and thereafter voiced concerns about having entered a plea of guilty, that would be one type of an appeal.

However, if there — if that was not the issue but there could be an appeal of the sentence — and is that the question you're asking me?
Q. I'm just wondering what you would do in such a case.
A. With respect to filing an appeal of the sentence?

[TR. 36]

Q. With respect to filing an appeal in a plea case. In any plea case.

Would you do so?
A. Again, with respect to the plea — the entry of the plea itself, if — I would not file an appeal of the entry of the plea unless the defendant voiced concerns that he wanted to withdraw the plea.

With respect to the sentence, I would not always file an appeal of the sentence. In a murder — if a defendant pled guilty to a charge of murder and he were sentenced to prison and denied probation, if probation were a possibility, I personally would not automatically file an appeal of the sentence.
Q. This plea, do you remember the plea in this case? Or have you reviewed the transcript of the plea in this case?
A. This morning, I reviewed a transcript of the change of plea, yes.
Q. And it was a difficult change of plea to get through, wasn't it?
A. Yes, it was.

Q. Did you, after the change of plea, talk to Mr. Flores Ortega?
A. On the very same day of the plea?
Q. Between the plea and the sentence, did you talk to him?
A. Okay. I do not have an independent recollection of it.

[TR. 37]

But I have reviewed my notes, and I believe I provided copies of the — my — all of the notes that I made.

I interviewed Mr. Flores on one occasion between the entry of the plea and the sentencing, and that was the day before sentencing. I reviewed the sentencing report with Mr. Flores.
Q. And at that time, did you explain through the interpreter what his sentence was going to be?
A. I explained, I'm sure. I don't — again, I don't have the — a recollection. But I'm sure I went over everything on the form, and the report was recommending a prison sentence.
Q. And do your notes reflect whether he objected to the sentence or was upset about the sentence that was being proposed in the presentence report?
A. I've reviewed my notes. And my notes simply say that I reviewed the report with him.
Q. Okay. I am going to hand you a document which has not previously been marked, but which Mr. O'connor has reviewed.

Do you recognize that document?
A. Yes. That is the sentencing report that I went over with Mr. Flores.
Q. And is that your handwriting in blue ink at the bottom?
A. Yes, it is.
Q. And what does it say?

A. It says, in one portion, "Bring appeal papers." And on the other — the bottom of the first page, my own notes:

[TR. 38]

> "No record. Felix humiliated. Felix had weapon, which he exhibited. Victim had been drinking" — the abbreviation for had been drinking — "at bar with Felix. Children. Works."

Q. And then there's a little notation that says, "Health problems."
A. "Health problems."
Q. Were those arguments that you anticipated presenting to the judge —
A. Yes.
Q. — in — I'm sorry — in response to the presentence report?
A. Yes. Those are arguments that I was going to make to the court, and I believe I did make. I reviewed the sentencing transcript as well. Arguments that I made to the court regarding why I believed Mr. Flores should be considered for a grant of probation.
Q. Having seen the — what sentence did he ultimately receive?
A. A 15-year state prison sentence. Fifteen years to life.
Q. Did you — what does the notation "Bring appeal papers" mean to you?
A. It meant that I was telling myself as a reminder to take appeal papers with me the following day to court for Mr.

[TR. 39]

Ortega to sign.

Q. And did you in fact do so?
A. No. I mean, I believe I must not have, because if an appeal was not filed, I must not have taken them —
Q. So the —
A. — over there.
Q. — ordinary procedure would be that you would bring the appeal papers to court and have him sign them, and then file them for him in pro per.
A. No. I would, as a matter of convenience. If an appeal was going to be filed, I would take the appeal papers with me to court and have my client sign them in court out — as a matter of convenience to myself so that I would not later have to go over to the jail. And then I would file those appeal papers on the fourth floor in the Superior Court Clerk's Office.
Q. And did you say to Mr. Flores Ortega, if you know, that you would file the appeal papers?
A. I have no memory of that. And I believe that a — it's certainly possible on the day before sentencing when I reviewed the probation report with Mr. Flores and in discussing the fact that the probation officer was recommending a state prison sentence and in discussing the fact that statutorily he was eligible for a grant of probation, it is certainly possible that I could have told him that he could file an

[TR. 40]

appeal or I could file an appeal if the court granted him — did not grant him probation.

MS. VORIS: I have no further questions.
Your Honor, I would — if I may, I'd like to —
THE COURT: Mr. O'Connor?
MS. VORIS: — enter this as an exhibit.
THE COURT: Have any questions at this time?
MR. O'CONNOR: Oh. Yes, Your Honor.

MS. VORIS: Your Honor, I'd like to have this marked and —

THE COURT: Do you wish to offer this in evidence?

MS. VORIS: Yes.

THE COURT: All right. It will be received.

THE CLERK: That will be Exhibit A.

THE COURT: Be Plaintiff's Exhibit —

THE CLERK: A.

THE COURT: — A.

This appears to be the original report.

THE WITNESS: It is.

THE COURT: And your original notes; is that correct?

THE WITNESS: That's correct.

THE COURT: All right. Would you like to have this, or do you have a copy?

MR. O'CONNOR: I have a copy. Thanks.

///

[TR. 41]

CROSS-EXAMINATION

BY MR. O'CONNOR:

Q. All right, Ms. Kops. Do you believe that you ever promised to file a notice of appeal on Mr. Ortega's behalf?

A. When you use the word "promise," I would say I don't believe that I promised Mr. Ortega that I would file a notice of appeal on his behalf.

Q. All right. If you had promised to file a notice of appeal, would you have done so?

A. I believe, knowing myself, that if I had promised to file a notice of appeal, I would have followed through and done so.

Q. All right. Is filing a notice of appeal a difficult task?

A. No.

Q. All right. Could you describe the process of filing a notice of appeal.

A. With respect to a sentence? Filing a notice of appeal with respect to a sentence, as in this case, there is a form which is approximately four or five pages in length. And I would fill out my client's name, the case number, his location as being in custody. I would put a check mark or an X in a few different places. And I would have my client sign his name in two different places.

And then I would take it to the fourth floor of the courthouse to the Clerk's Office. And I would hand it to a clerk there and get a copy and have a copy of the front page in my file showing that I

Kops - Cross

[TR. 42]

had filed such a notice.

Q. All right. And you have filed notice of appeal — notices of appeal before in other cases, correct?

A. Yes.

Q. All right. If you had promised to file a notice of appeal and you had the appeal papers with you at sentencing, what would you have done?

A. I would have had Mr. Flores sign in the two different places where he would need to sign. And then I would have taken that form to the fourth floor and filed it with the Clerk.

Q. All right. And if you had promised to file a notice of appeal and you didn't have the appeal papers with you at sentencing, what would you have done?

A. I would have obtained a copy of the notice of appeal from my office and taken it over to the jail with an interpreter from my office and had Mr. Flores sign the papers and then filed the notice of appeal.

Q. All right. And if you had — well, let's see. Do you

believe that the petitioner ever asked you to file a notice of appeal on his behalf?
A. Well, again, in the conversation the day before sentencing, when we discussed the recommended sentence of 15 years to life and the fact that that's what the court would, in all likelihood, give him, and the fact that he was statutorily

[TR. 43]

eligible for probation, he may have said words to the effect that he wanted probation.

Again, I don't recall that specifically. But he certainly may have. And I might very well have said, "Well, we can file an appeal if you are denied probation."
Q. All right. But you have no recollection of this.
A. I don't have a specific recollection of that conversation.
Q. All right. And would you have encouraged him to appeal his sentence?
A. I would not have, in my own mind, encouraged him to file an appeal of the sentence.
Q. Okay. And why not?
A. I would —

MS. VORIS: I would object on the grounds of relevance.

THE COURT: Overruled.

THE WITNESS: The question was why would I not have?
BY MR. O'CONNOR:
Q. Yeah. Why would you not have encouraged him to file an appeal of his sentence?
A. I personally don't think I would have encouraged him because I would have expected an appeal of the sentence not to have been — I mean, the appeal would

not have been granted. Or the sentence would not have been reversed. That would be my —

[TR. 44]

Q. And —
A. — feeling.
Q. And you were certain that the sentence would not be reversed; isn't that right?
A. Well, I would feel quite certain of that, yes.
Q. Right. This was a murder case, and the only grounds for appealing the sentence would be that the judge abused his discretion in denying probation; isn't that right?
A. Yes.
Q. And in your opinion, that is not a claim which is likely to succeed on appeal.
A. Correct.
Q. In fact, it would almost certainly fail.
A. That would be my belief, yes.
Q. Okay. Now, regarding the "Bring appeal papers" notation on the probation report, it's possible that you wrote this simply as a memo to yourself without discussing an appeal of the sentence; isn't that right?
A. That it's possible. I mean, I have a recollection over the course of years of sometimes writing that as a memo to myself so that I will bring appeal papers over if there is a possibility — such as in this case, there is a possibility of an appeal being filed because of the probation being a potential — it's an option.
Q. Okay. All right. And that is just as possible as a

[TR. 45]

scenario where you wrote the "Bring the appeal papers" notation as the result of a discussion about an appeal.
A. Both are possibilities.

Q. Both are possibles.
One is no more possible than the other.
A. It's hard for me to say if one is more possible than the other.
Q. Okay. Now, if the petitioner asked you to file a notice of appeal and you had appeal papers with you at sentencing, what would you have done?
MS. VORIS: Your Honor, asked and answered.
MR. O'CONNOR: Well —
THE COURT: Sustained.
MR. O'CONNOR: — it's — okay. All right.
BY MR. O'CONNOR:
Q. Okay. Now, if the petitioner felt his plea was involuntary and he wanted to go to trial, one possible remedy was to move to withdraw his plea; isn't that right?
A. Yes.
Q. All right. Do you believe that petitioner ever asked you to move to withdraw his plea?
A. No.
Q. All right. And let's see. November — according to your notes, November 9th, 1993, the day before sentencing, was the only time between the entry of plea and the sentencing hearing

[TR. 46]

that you spoke to the petitioner, correct?
A. Yes.
Q. All right. Now, if on November 9th, 1993, the petitioner said he wanted to withdraw his plea, what would you have done?
A. I believe that I would have brought this to the court's attention prior to the court pronouncing sentence. That would have been the appropriate thing for me to do. And I believe I would have done that.

Q. All right. And would you have made notes of such a conversation?
A. I can't swear I would have made notes. But I think if my client had firmly said he wanted to withdraw his plea, there is a probability I would have noted that.
Q. All right. A high probability?
A. You're saying if he had said this the day before in that conversation —
Q. Right.
A. — would I have noted that?
Q. Right.
A. Again, I think I would have. How high the probability is, I don't know.
Q. Okay. And you have no notes of such a conversation.
A. That's correct.
Q. Okay. Now, if on November 10th, 1993, the day of sentencing, prior to the pronouncement of sentence, appellant — or

[TR. 47]

excuse me, petitioner indicated to you that he wished to withdraw his plea, what would you have done?
A. Again, it would have been appropriate for me to bring this to the court's attention before the court pronounced sentence. And I believe that's what I would have done.
Q. Okay. And you would have made a statement on the record to that effect.
A. Yes.
Q. All right. And have you reviewed the transcript of the sentencing hearing?
A. I did that several months ago, yes.
Q. All right. And was there any indication on the record that you brought this to the court's attention?
A. No. There was no such indication on the record.

Q. All right. Okay. And if on November 10th, 1993, after pronouncement of sentence, the petitioner had indicated to you that he wanted to withdraw his plea, what would you have done?
A. If he had told me after sentencing that he wanted to withdraw his plea?
Q. Right.
A. I think I would have felt the need to discuss this with him. And I believe that it would have been unlikely I could have accomplished such a — well, I don't know if I could have done that in the courtroom.
Q. All right.

[TR. 48]

A. But I probably — again, I might very well have gone over to the jail thereafter to talk to him about that.
Q. All right. But you would have had further discussions with him at the jail; is that correct?
A. Yes. I believe I would have done that.
Q. All right. And you had no such discussions, correct?
A. There — I don't recall that. And there is nothing in my file to indicate from my notes that I went over to the jail to talk to him about such a matter.
Q. All right. And you don't believe that any further discussions occurred.
A. I don't believe they did, no.
Q. All right. Okay. Now, to attack the validity of petitioner's guilty plea on appeal, you would have needed to have sought a certificate of probable cause; isn't that correct?
A. Yes.
Q. All right. Do you believe that you ever promised to seek a certificate of probable cause on petitioner's behalf?
A. No. I'm sure I did not.

Q. Okay. Do you believe that petitioner asked you to seek a certificate of probable cause?
A. No.
Q. All right. Do you recall — do you believe you had any conversations with petitioner concerning a certificate of probable cause?

[TR. 49]

A. No.
Q. All right.
THE COURT: Excuse me, Mr. O'Connor. Are you going to be much longer with this witness?
MR. O'CONNOR: No. Actually, I think I'm finished.
THE COURT: Fine. Do you have any —
MS. VORIS: Your Honor, I do have a couple of questions. I don't think they'll be more than —
THE COURT: Well, it's —
MS. VORIS: — five minutes or so.
THE COURT: — twelve o'clock. But we can finish with the witness.
(Discussion off the record)

REDIRECT EXAMINATION

BY MS. VORIS:
Q. Ms. Kops, does the fact that you might not encourage someone to file a notice of appeal prevent you in any way from filing one?
A. No. It wouldn't prevent me from filing one. If my client asked me to, I would — whether I had encouraged it or not, I would still go ahead and file it.
Q. In fact, in probably most cases, particularly where there's a plea, your legal advice might be that you won't win, but you would still file the notice of appeal; is that correct?

[TR. 50]

A. If my client asked me to, yes.
Q. And your notes to "Bring appeal papers" could indicate to you that there was some discussion of appeal.
A. Yes.
Q. Given the difficulty in the change of plea, which appeared to me that on nearly every page of the plea he made a statement such as — that he didn't really want to plea and that he was pleading because his attorney told him to and things like that — does that refresh your recollection about dealing with Mr. Flores Ortega and the interview — the postplea presentence interview?
A. No.
Q. So you didn't go in there kind of — with a feeling that there might be some problems with his comprehension of the procedures.
A. Going to the —
Q. I'm sorry. When you went to discuss his sentence with him —
A. Yes.
Q. — having had this very difficult plea, did you have it in your mind that there might be some problems, given the recommended sentence?
A. Okay. I don't have a specifically — a specific memory of what my state of mind was. But I — it's possible that I anticipated anything. I don't know.

[TR. 51]

Q. Now, do you believe that you wrote those notes the day before you went to court for the sentencing? The note that you wrote on the presentence report.

A. I would estimate I probably did write it the day before.
Q. And it is possible that you wrote those notes and then just forgot to bring the appeal papers, isn't it?
A. Right. That's possible, yes.
Q. And it's possible that with the press of business, that you didn't even see the notes and forgot to go over to the jail to then get him to sign the appeal papers after you forgot to bring them to court.
A. I would say it's possible. But I would also say if I made a promise that I would file an appeal, I would not forget a — I would be unlikely to forget a promise.
Q. Let's say that the — hypothetically, the conversation was that Mr. Flores Ortega said, "I'm not guilty. How could I do 15 years?" Given his plea that — that's a possibility that he would use words such as that, isn't it?
A. He certainly could have said that.
Q. And is it possible that you could then have said, "If you are sentenced to 15 years, we will file an appeal"; is that correct? Would that be a way that the conversation could have gone?
A. It's possible.
Q. When you have an upset client, do you discuss appeal with

[TR. 52]

him? Even if —
A. Well, certainly.
Q. — you don't recommend it.
A. Certainly. I mean, that would be — an appeal of the sentence is something that certainly could have come up in that conversation that I had with him.
Q. And it could have been that you said, "I will get the appeal papers for you and bring them to court tomorrow."
A. It's possible, yes.

Q. And though you believe that if you had made such a promise, you would have remembered, it's possible that you didn't.
A. I guess it's the word "promise" that's a little bit — we could have had such a discussion like you just recited, and I forgot. I did not bring the appeal papers. I believe I didn't bring them.
Q. So let's take the word "promise" out and assume that that was a word inserted either by Mr. Flores Ortega or by the person who prepared his papers. And have it be that you said, "If you're not happy with the sentence, we can file an appeal."

Is that a likely scenario?
A. That certainly is a very good possibility that something similar to that could have been — I could have said that.
Q. And you would have written "Bring appeal papers" on your sentencing memo at that time. And then —

[TR. 53]

A. I could have, at that time, yes.
Q. And then —
A. I could have.
Q. — it's possible that you forgot to bring the appeal papers.
A. Yes.

MS. VORIS: I have no further questions.
THE COURT: Anything further?
MR. O'CONNOR: Nothing further.
THE COURT: Ms. Kops, couple questions.
THE WITNESS: Okay.

EXAMINATION

BY THE COURT:
Q. First of all, how long with you been with the Public

Defender staff in Fresno County?
A. Since January 14th, 1977.
Q. And how long have you been defending criminal felony cases?
A. I would say since maybe about 1980.
Q. In 1993 at the time of the sentencing in this case, did you have an office policy with reference to advising your clients or clients of the office of their rights of appeal?
A. I don't believe we have a very concise policy that I have ever been told.
Q. Did you personally have a policy in that regard?

Kops - Examination

[TR. 54]

A. I would not describe my policy as a strict policy. But certainly, if I discussed with a client and I were — I told a client, "I will file an appeal," I believe my policy would be to always follow through on my promise. But —
Q. Would you have — in every case where a client has been either convicted or entered a plea of guilty to a felony, would you have advised that client of their rights of appeal?
A. To the sentence? An appeal of the sentence?
Q. Yes. Or — either one. They have a right of appeal from entering a plea.
A. Right. I — no. My personal policy is that if a client has entered a plea and does not thereafter voice to me a change of heart, I would not discuss the right to appeal of his plea under those circumstances.
Q. Would you have discussed with a client his right of appeal from the sentence?
A. If — certainly, if there is a range of options and I feel that he has a chance — well, let me try and phrase this.

Under some circumstances, yes.
Q. But not in every case.
A. But not in every case.
Q. Okay.
A. If —
Q. To your recollection — and you've reviewed the transcript of the sentencing hearing — was this plea entered as a result

[TR. 55]

of a plea bargain?
A. Yes. There was a plea bargain.
Q. Was it a bargain with reference to sentence as well as a plea of what count?
A. No. The bargain was that the charge would be a second degree murder. The knife enhancement was stricken. And the two other charges of 245(a) were to be dismissed. That was the bargain.
Q. And so the matter of sentencing would have been left up — strictly up to the court.
A. Right.
Q. Okay. Do you have a personal recollection at this time of having any discussion with Mr. Ortega following the pronouncement of sentence in this case while you were still in court?
A. No. I have no such recollection.
THE COURT: Thank you.
Any further questions by Counsel?
MS. VORIS: I have two more questions.

REDIRECT EXAMINATION

BY MS. VORIS:
Q. One, Ms. Kops, did you hand me that presentence report with your signature — with your handwriting on it this morning here in Court?

A. Yes.
Q. And did that come from your file?

Kops - Redirect

[TR. 56]

A. Yes.
Q. And are you familiar with Penal Code Section 1240.1 regarding the obligations of an attorney who is appointed with regard to a filing of timely notice of appeal?
A. With respect to that particular Penal Code section, I can't say I can quote it to you, but —
Q. And would it surprise you if you heard that there were other public defenders who make it a policy to file a notice of appeal in every murder case?
A. With respect to the sentence?
Q. That they file a notice of appeal in murder cases.
A. Well, I guess it would be with respect to what specifically? It might surprise me —
Q. Okay.
A. — if on a plea.
MS. VORIS: Thank you.
THE COURT: All right. May this witness be excused?
MS. VORIS: Yes.
THE COURT: Mr. O'Connor?
MR. O'CONNOR: Nothing further, Your Honor.
THE COURT: All right. May she be excused from the hearing?
MR. O'CONNOR: Yes.
THE COURT: All right. You are excused —
THE WITNESS: Okay.

[TR. 57]

THE COURT: Ms. Kops
THE WITNESS: Thank you.

(Whereupon, the witness was excused)

[END OF TRANSCRIPT - PAGE 57, LINE 3]

**TRANSCRIPT OF PROCEEDINGS,
EVIDENTIARY HEARING ON JANUARY 24, 1997,**

[START OF TRANSCRIPT - PAGE 68, LINE 9]

PLAINTIFF'S CLOSING STATEMENT

MS. VORIS: Your Honor, petitioner has made the argument in this petition and in this Court that Ms. Kops indicated to him that she would file a notice of appeal. It was clear to Ms. Kops and probably — and I would say to the Interpreter and to anyone who came in contact with this defendant that he did not have a clear understanding of procedures or of the nature of what was going to take place.

I think that based on her notes, there was a discussion about a notice of appeal. And for whatever reason, whether it was because she forgot or failed to get over to the jail, a notice of appeal was not filed.

Whether it was phrased in the form of a promise or whether it was phrased in the form of a statement, I think that there was a discussion of appeal and that Mr. Flores Ortega had a legitimate expectation that the notice of appeal would be filed.

[TR. 69]

I think that his weight of — I believe the Attorney General stated it, of four months under the circumstances was not even an unreasonable time to then contact somebody and find out what had happened with his appeal when he found out that time had passed.

He had someone write a letter to his attorney, and that letter is in the record, asking what happened to his

appeal? Where was it? And the response was that he had not asked her to file one, I believe. I'm paraphrasing.

But what I think happened and I think was clear from the evidence on the record was that there was a discussion of an appeal, that Ms. Kops was supposed to bring the appeal papers, that she under ordinary circumstances would have, that she forgot, that she did not then go over to the jail with appeal papers, or she closed the file and let it go, and it didn't get filed.

Due to his inability to communicate clearly and his drafter's inability to communicate clearly, perhaps when it went to the Fifth District it was not articulately stated for the Court of Appeal that she — that Ms. Kops had said she would file the appeal. I think that when he said the — that she had not explained procedures, that it is not even a conflict between the two statements to say that she didn't explain the procedures and the time limits and she also said she was going to file it so that would explain why she didn't

[TR. 70]

explain the procedures and the time limits.

I think at under the circumstances, Mr. Flores Ortega should be permitted to file his notice of appeal and be permitted to proceed as though his judgment were entered from this point.

THE COURT: Let me ask you this: The petitioner has the burden of proof in these cases. And in this case, the petition alleges, at least, that the attorney failed to keep her promise and file a notice of appeal.

What would be your position if the Court determines, based upon the evidence presented, or should determine that the petitioner has not carried his burden of proving that particular allegation?

MS. VORIS: Well, I would disagree. I think —

THE COURT: Well, just assume that.

MS. VORIS: Assuming — what would be our position if we said that if the Court said —

THE COURT: Would that end this case?

MS. VORIS: Would that end this case? I — to be candid, Your Honor, I'm not sure whether it would end —

THE COURT: What do we do with —

MS. VORIS: — this case.

THE COURT: — with the decision in *Sterns*?

MS. VORIS: I'm sorry?

THE COURT: In *U.S. v. Sterns*.

[TR. 71]

MS. VORIS: *Sterns*. I believe under — now, I have to be candid that at lunchtime I went and ate lunch and I did not go read *United States v. Sterns*. But I think that it's quite clear that he did not consent to a failure to file a notice of appeal.

THE COURT: But that's not the allegation.

MS. VORIS: That's true. But I think under the circumstances — I think — and I may be incorrect on this, but I think that the allegations can be read broadly to say, well, it did not contain, perhaps, a promise, which was the word which Ms. Kops, I think, had a problem with. She didn't say, "I promise you that I will go file a notice of appeal."

I think she may have said, "I will file a notice of appeal." But she may not have said, "I promise."

And I think that *Sterns* may leave it open, that he clearly did not consent to a failure to file a notice of appeal. And I would ask that the petition be amended to reflect that.

THE COURT: Well, I'm not going to entertain that motion at this time.

MS. VORIS: Okay.

THE COURT: Thank you.
MS. VORIS: Thank you.
THE COURT: Mr. O'Connor?
MR. O'CONNOR: Yes, Your Honor.

[TR. 72]

DEFENDANT'S CLOSING STATEMENT

MR. O'CONNOR: It's clear in this case that the petitioner has failed to meet his burden that would sustain his allegation. His assertion here is simply not credible.

This assertion about the broken promise with regard to filing notice of appeal was not made in his Fifth District petition. In fact, it's our position that it was contradicted by his assertion that his attorney told him nothing about appeal procedures.

He said during my cross-examination that he had the assistance of an interpreter while preparing this Fifth District petition. So — and it's furthermore not credible that he would sign it without knowing what his — what the contents of it were. Let's see.

Also, he failed to follow up on the purported request for a notice of appeal in a timely manner. Also, he makes no mention of a certificate of probable cause or a motion to withdraw a plea in his petition.

It would have been a simple task for the defense attorney to file the notice of appeal. Ms. Kops indicated she would have filed the notice of appeal at the sentencing hearing if she had had the appeal papers. If she hadn't had the appeal papers with her, she would have gone to the jail and discussed the matter with him. She didn't do these things or doesn't believe that she did these things, and this

[TR. 73]

supports the inference that there was no promise.

The interpreter's lack of recollection of discussions concerning an appeal also provides some corroboration for our position.

With regard to an appeal of the sentence, the petitioner is not asserting in his petition that he wanted to attack his sentence. He's asserting that he wanted to attack the validity of his plea, that his plea was involuntarily entered. So the lack of — so really, this whole issue about appealing the sentence is a red herring.

As to the "Bring appeal papers" notation on the probation report, Ms. Kops testified that it was equally probable that this simply could have been a memo to herself to bring appeal papers and that this could have occurred without the discussion of an appeal.

And so I think that the petitioner has failed to meet his burden in supporting his assertion regarding a broken promise with respect to a notice of appeal.

THE COURT: How would you answer the same questions that I asked —

MR. O'CONNOR: Well —

THE COURT: — Ms. Voris?

MR. O'CONNOR: — I think there is absolutely no evidence supporting the position that he did not consent to abandoning his appeal. There is, you know, nothing in his

[TR. 74]

behavior until March of '94, well after the expiration of the appeal period, that indicates that he was in any way interested in filing an appeal or pursuing an appeal. So there is simply no evidence that he did not abandon his appeal.

So I think that even under *Sterns* the petitioner is not entitled to relief.

THE COURT: Well, I don't know. It appears to me that the facts of this particular case are very, very close to those in *Sterns*. *Sterns*, it was a plea case. The allegation in *Sterns*, if I read it correctly, was that he did not consent to his trial counsel's failure to file a notice of appeal.

Well, that is not the allegation in this case. But as the court — the Ninth Circuit states in this opinion — and I'm now reading from 68 F.3d at page 330:

> "Again, however, we have said that the answer turns on the question of whether the petitioner consented to the failure to file a notice of appeal, rather than on whether counsel ignored an explicit request to file. Of course, Sterns said that he did make a request. But he need only show that he did not consent to the failure to file."

The evidence in this case is, I think, quite clear that there was no consent to a failure to file.

[TR. 75]

MR. O'CONNOR: Well, Your Honor, I —

THE COURT: There's no testimony that way.

And what I'm afraid of here, even if I should find that the petitioner has not sustained his burden in proving the specific allegation — i.e., the breach of a promise to file a notice of appeal — I'm afraid the Ninth Circuit would clearly say the circumstances of this case are such that he did not consent to the failure to file a notice of appeal. And therefore, the result would be the same as in *Sterns*.

MR. O'CONNOR: Yeah. Well, I —

THE COURT: And I'm not — I don't think — that's why I asked this question, because I'm not sure —

MR. O'CONNOR: Right.

THE COURT: — of course.

MR. O'CONNOR: Well, I think perhaps we can infer from the circumstances that his complete inaction with regard to an appeal indicates that he did consent to the failure to file an appeal.

THE COURT: But I think — I might as well tell you:

From the evidence presented, I do not find as — that the petitioner has proven by a preponderance of the evidence the specific allegation in the complaint.

It's clear to me that Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game.

[TR. 76]

I think there was a conversation in the jail. Mr. Ortega testified, and I'm sure he's testifying as to the best of his belief, that there was a conversation after the pronouncement of judgment at the sentencing hearing where it's his understanding that Ms. Kops was going to file a notice of appeal.

She has no specific recollection of that. However, she is obviously an extremely experienced defense counsel. She's obviously a very meticulous person. And I think had Mr. Ortega requested that she file a notice of appeal, she would have done so.

But I cannot find that he has carried his burden of showing by a preponderance of the evidence that she made that promise.

But — so I'm going to do this: I am going to ask you to brief the questions that I just asked.

MR. O'CONNOR: Thank you, Your Honor.

THE COURT: And would you like to do it simultaneously, or would you like to do back and forth?

MS. VORIS: I have no preference in that regard. I think if it's — obviously, it doesn't matter, because I would be first anyway. So —

THE COURT: Right.

MS. VORIS: — it would probably —

THE COURT: Mr. O'Connor, what's your preference?

[TR. 77]

MR. O'CONNOR: Again, no preference.

MS. VORIS: It would probably —

THE COURT: Why don't we just file — please, how much time would you like?

MR. O'CONNOR: Well, I think it takes a couple of weeks to prepare a transcript, so —

THE COURT: I'm sorry?

MR. O'CONNOR: It takes two weeks to prepare a transcript normally, doesn't it?

THE COURT: That's fine, if that will give you sufficient time.

MR. O'CONNOR: Well, so —

MS. VORIS: We would need to get the transcript, I guess, of this hearing, which would take two weeks. And then I would like to have it sometime in March, I would think.

THE COURT: Sometime in —

MS. VORIS: In March.

THE COURT: — March?

MS. VORIS: For briefing. March or April, either one. Whatever's —

THE COURT: You think you would need that much time?

MS. VORIS: Pardon? I — Your Honor, I have two oral arguments and a trial in February and — which I'll need to prepare for. Two oral arguments at the Ninth. And then after that, I'm fairly flexible. But —

[TR. 78]

THE COURT: Well, since you're requesting it — I wouldn't give him that time, if he had requested — but I'll — if you wish it, I'll give it to you.

How about the 14th?

MS. VORIS: Of March?

THE COURT: Of March.

MS. VORIS: I think that would be —

THE COURT: On or before the 14th of March. That's a Friday.

And Mr. O'Connor, you can file yours on or before the 14th of March also.

MR. O'CONNOR: All right. Very good.

MS. VORIS: Your Honor, and then if we choose to respond to the other's brief, should we set a schedule, or should we just respond within 10 days or —

THE COURT: I'm sorry? Give me again.

MS. VORIS: Would you like us to respond to the other's arguments in brief form? Do a reply brief.

THE COURT: I don't want to preclude it. That's why I asked the original question, whether you wanted to do this in a —well, if — why don't we do this? Let me give you a — if you wish, each of you would have additional week to respond.

MS. VORIS: That's fine.

MR. O'CONNOR: All right.

[TR. 79]

THE COURT: So the matter will stand submitted on March the 21st at 5:00 p.m., whether I receive responses or not.

MS. VORIS: Thank you, Your Honor.

THE COURT: All right?

MR. O'CONNOR: Thank you.

THE COURT: And let me ask you to do this, if you would: File your original in the file here, and then send me a copy at Yosemite.

And you have the address up there, assuming I'm still there?

MS. VORIS: I do.

THE COURT: I'm not so sure after listening to the news about the current weather this weekend. But we'll see.

The address there is P.O. Box 575.

MS. VORIS: Your Honor, would you — just for clarification. I know you want us to address these specific issues.

I, of course, probably not surprisingly, disagree with your finding that we have not met our burden. And I would like to argue that within the context of this brief.

Is that permissible within the context —

THE COURT: I don't —

MS. VORIS: — of this brief?

THE COURT: — think so. I don't think I'm going to

[TR. 80]

change my mind.

MS. VORIS: Okay. So our issue then would simply be whether —

THE COURT: So it's simply the effect of such a

finding, whether that ends the case or whether we have to take into consideration the court's holding in *U.S. v. Sterns*.

It's my — I'll tell you. It's my current feeling that we do. But —

MS. VORIS: Okay.

THE COURT: — maybe you can show me differently.

MR. O'CONNOR: So would the question be —

THE COURT: And if we do — as I've already discussed with you, if I should find that *Sterns* is controlling here — and we have to follow *Sterns* rather than *Castellano* (phonetic) —

MR. O'CONNOR: No. I know.

THE COURT: If I do find that, then the order, of course, would be a conditional order ordering the superior court to refile a judgment which would start the appeal time running again.

MS. VORIS: Thank you, Your Honor.

THE COURT: All right?

MR. O'CONNOR: So more generally, the question would be whether the petitioner is entitled to relief under *Sterns* in light of the ruling today.

[TR. 81]

THE COURT: Yeah.
MR. O'CONNOR: Okay. All right.
THE COURT: Thank you very much.
MS. VORIS: Thank you.
MR. O'CONNOR: Thank you.

(Whereupon, the hearing in the above-entitled matter was adjourned.)

[END OF TRANSCRIPT - PAGE 81, LINE 7]

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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

February 3, 1997

Siri L. Panton, Transcriber

WARDEN'S POST-HEARING BRIEF FILED MARCH 14, 1997

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, Petitioner, v. ERNEST C. ROE, Respondent.	CIV-F-95-5612 GEB HGB **RESPONDENT'S POST-HEARING BRIEF**

Pursuant to this Court's order of January 24, 1997, respondent submits the following brief addressing the question of whether petitioner is entitled to relief under *United States v. Stearns*, 68 F.3d 323 (9th Cir. 1995), in light of this Court's finding that petitioner failed to meet

his burden of showing that his trial defense attorney promised to file a notice of appeal on his behalf. Reporter's Transcript of January 24, 1997, Evidentiary Hearing ("RT 1/24/97") 2 (scope of hearing); RT 1/24/97 75, 76 (court's finding); RT 1/24/97, 76, 80, 81 (order regarding briefing). *Stearns* held that even in a guilty plea case, a federal habeas petitioner need only show that he did not consent to counsel's failure to file a notice of appeal. *United States v. Sterns*, 68 F.3d at 330.

Respondent submits that petitioner may not obtain relief under Stearns because it states a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989); further, *Stearns* is distinguishable from the present case.

PETITIONER IS NOT ENTITLED TO RELIEF UNDER UNITED STATES v. STEARNS BECAUSE IT STATES A "NEW RULE" BARRED BY TEAGUE v. LANE

Petitioner is not entitled to relief under *United States v. Stearns*, 68 F.3d 328, because *Stearns* states a "new rule" as described by *Teague v. Lane*, 489 U.S. 288. Federal habeas corpus relief will be denied if the claim rests on a "new rule" which was announced after petitioner's case became final. *Teague v. Lane*, 489 U.S. 288, 299-316. A "new rule" breaks new ground or imposes a new obligation on the states if the result was not dictated by precedent. *Id.* at 301. *See also Saffle v. Parks*, 494 U.S. 484, 486 (1990). Finality is defined as the expiration of the time within which to petition for writ of certiorari on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 321, n. 6 (1987). The application of *Teague* is a threshold question. *Graham v. Collins*, 506 U.S. 461, 466-467 (1993).

A three-step test for the application of *Teague's* new rule prohibition is set forth in *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). The court first is to look at

the date petitioner's case became final on appeal. *Ibid.* In this case, petitioner was sentenced on November 10, 1993, and had 60 days within which to file a notice of appeal which was not filed. His conviction therefore became final on January 9, 1994. *See* Reporter's Transcript of the November 10, 1993, sentencing (lodged with this Court when respondent filed his answer); *see also* Cal. Rules of Court, rule 31(a); Historical Note, 23 pt. 1 West's Cal. Ann. Court Rules (1996 ea.) rule 31(a), 322-325.

The second step is to survey the legal landscape at the time of finality to determine whether the rule petitioner seeks to apply is a new one. *Caspari v. Bohlen*, 510 U.S. 383, 390. Even if the result petitioner seeks is within the "logical compass" of a prior Supreme Court decision (*Butler v. McKellar*, 494 U.S. 407, 415 (1990)), and even if Supreme Court decisions "inform or even control or govern the analysis" of the claim (*Saffle v. Parks*, 494 U.S. 484, 491), it is still a new rule unless the result is actually dictated by pre-existing precedent. The Ninth Circuit recites that a rule is not dictated by precedent where reasonable courts might disagree about its application. *Greenawalt v. Ricketts*, 943 F.2d 1020, 1024-1025 (9th Cir. 1991), criticized on different grounds in *Reeves v. Hopkins*, 102 F.3d 977, 984, 985 (8th Cir. 1996); *see also Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995).

At the time of petitioner's case, criminal defendants doubtless had a recognized right of counsel on appeal as a matter of right. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Moreover, *Rodriguez v. United States*, 395 U.S. 327, 330 (1969) had held that in considering the denial of the right to appeal, the issue of prejudice is not to be considered. There was no affirmative duty to advise, however, and, in particular, there was no duty of advice following a plea of guilty. In fact, circuit cases specifically slated that there was no duty to advise of the

right to appeal after a guilty plea. *See, e.g., United States v. Lewis*, 880 F.2d 243, 246 (9th Cir. 1989), abrogated on different grounds in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992); *Morrow v. United States*, 772 F.2d 525, 528 (9th Cir. 1985); *see also Belford v. United States*, 975 F.2d 310, 314-315 (7th Cir. 1992) (citing cases), overruled on other grounds in *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) (defendant need not show prejudice from failing to appeal); *Hardiman v. Reynolds*, 971 F.2d 500, 506 (10th Cir. 1992) (exceptions for answering inquiry and constitutional issues). The California Rules of Court only required advice of the right to appeal after a trial or contested probation revocation. Cal. Rules of Court, rule 470.

In the present case, given the legal landscape that existed in January 1994 (e.g., the absence of a duty to advise defendants of appeal rights following guilty pleas), reasonable courts could have differed over whether federal habeas petitioners merely had to show that they did not consent to the abandonment of their appeal rights following their guilty pleas. Reasonable courts could have adopted an alternate rule: in guilty plea cases, where there was not even a duty to advise defendants of their appeal rights, a federal habeas petitioner would have to show that he/she requested his/her attorney to file a notice of appeal and the attorney failed to do so. Indeed, other circuit courts have stated that the defendant must ask his/her attorney to file a notice of appeal. *See, e.g., Castellanos v. United States*, 26 F.3d at 719 ("'Request' is an important ingredient in this formula. A lawyer need not appeal unless the client wants to pursue that avenue.") (decided shortly after petitioner's case became final); *see also United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993); *United States v. Davis*, 929 F.2d 554, 557 (10th Cir. 1991); *Abels v. Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990). Although their holdings were not so limited, *Castellanos* and *Peak* involved a defendant who pleaded guilty. *Castellanos v. United States*, 26 F.3d at 718; *United States v. Peak*, 992 F.2d at 40. As noted, a rule is not dictated by precedent where reasonable courts differ about its application. *Greenawalt v. Ricketts*, 943 F.2d at 1024-1025. In the case at bar, reasonable courts could have differed about whether federal habeas petitioners merely had to show that they did not consent to abandonment of their appeals.[15]

The third step in *Teague* analysis is to determine whether either of two exceptions apply. *Caspari v. Bohlen*, 510 U. S. 383, 390. The first is seldom applicable and is limited to rules which place conduct beyond the reach of the criminal law. *Teague v. Lane*, 489 U.S. 288, 307. This is clearly inapplicable in the present case as *Stearns* does not "decriminalize" any conduct. The second exception involves new "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceedings. *Caspari v. Bohlen*, 510 U.S. 383, 396. It is not enough that accuracy or fairness be improved (*Sawyer v.Smith*, 497 U.S. 227, 242 (1990)), but it must be so fundamentally important that its announcement is a "groundbreaking occurrence." *Caspari v. Bohlen*, 510 U.S. 383, 396. It must be a "watershed rule" that "alter[s] our understanding of the bedrock procedural

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15. [Footnote 1 of Warden's Post-Hearing Brief.] *United States v. Horodner*, 993 F.2d 191, 195 (9th Cir. 1993), and *Lozada v. Deeds*, 964 F.2d 956, 958, did not dictate the result in *Stearns*. These cases do not address the issue of whether a petitioner is entitled to relief when he/she entered a guilty plea. Indeed, the defendant in *Horodner* had a court trial (993 F.2d at 195) and the defendant in *Lozada* had a jury trial. *Lozada v. State*, 110 Nev. 349 [871 P.2d 944, 945] (1994). Moreover, the Ninth Circuit could have chosen to reverse its prior holdings in *Lozada* and *Horodner* in light of intervening opinion in *Castellanos*.

elements essential to the fairness of the proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242. The prototype is *Gideon v. Wainwright*, 12 372 U.S. 335 (1963). *Spaziano v. Singletary*, 36 F.3d 1028, 1043 (11th Cir. 1994). The Supreme Court in *Teague* recited that "we believe it unlikely that many such components of basic due process have yet to emerge." *Teague v. Lane*, 489 U.S. 288, 313. Clearly, the rule articulated in *Stearns* does not rise to the level of a "watershed rule." Thus, petitioner is not entitled to relief under *Stearns* as it is a "new rule" within the meaning of *Teague*.

MOREOVER, STEARNS IS DISTINGUISHABLE FROM THE PRESENT CASE BECAUSE STEARNS INVOLVED A COMPLEX SENTENCING SCHEME GIVING RISE TO POSSIBLE APPELLATE ISSUES EVEN IN THE CONTEXT OF A GUILTY PLEA

Moreover, Stearns is distinguishable from the case at bar because in *Stearns* the court stated, "it might be more obvious to counsel that a defendant may well wish to appeal after a trial, but given the inspissate brumes [dense fog] generated by the guidelines, counsel can hardly assume that a defendant who has pled guilty does not wish to appeal his sentence." *United States v. Stearns*, 68 F.3d at 110. Thus, in *Stearns* there was a complex sentencing scheme which precluded trial counsel from assuming that the defendant did not want to appeal his sentence, even though he had pleaded guilty. In the case at bar, there was no such complex sentencing scheme. Indeed, trial counsel testified that she would not have encouraged petitioner to appeal his sentence because an appeal would not have been successful. (RT 1/24/97, 41-44.) Petitioner's only basis for appealing his sentence would have been to claim

that the sentencing court abused its discretion in denying probation to a defendant who had pleaded guilty to murder. (RT 1/24/97, 44.) In trial counsel's opinion, such a claim would almost certainly fail. (RT 1/27/97, 44.) Thus, while *Stearns*' counsel was precluded from assuming that Stearns did not want to appeal, in the present case such as assumption was warranted.[16/]

Accordingly, for the above-stated reasons, petitioner's claim for relief must be denied.

Dated: March 12, 1997.

Respectfully submitted,

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16. [Footnote 2 of Warden's Post-Hearing Brief.] Respondent reiterates that there were also no meritorious grounds for attacking the validity of petitioner's plea. For example, petitioner understood that he faced a sentence of 15 years to life. Answer 11-12. This supports the reasonableness of trial counsel's assumption that petitioner did not want to appeal.

PRISONER'S POST-HEARING BRIEF
FILED MARCH 14, 1997

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES-ORTEGA,	NO. CV-F-95-5162 GEB HGB P
Petitioner,	POST-HEARING BRIEF
v.	Date: January 24, 1997
ERNEST C. ROE,	Judge: Hon. Hollis G. Best
Respondent.	

BACKGROUND

On October 13, 1993, Lucio Flores-Ortega entered a plea of guilty to the charge of second degree murder in the Superior Court of Fresno County before the Hon. Dwayne Keyes. He was represented by the Public Defender, Nancy Kops. The taking of the plea was excruciating, as evidenced by the transcript of the change of plea, attached hereto as Exhibit A. While back-pedaling on his plea of guilty, the defendant

asserted that, "seeing that I am alone, I am with the help of no one, it's better that I plead guilty." (COP 4)[17]

The interpreter, upon signing the plea form in open court indicated to the court that she did not editorialize, that she interpreted the Change of Plea form, and that she only interpreted what the attorney said and what the defendant said. (COP 14). The same interpreter testified at the evidentiary hearing. She remembered the case, and the defendant, because it was a difficult plea to get through. The plea was taken pursuant to *People v. West*, permitting Flores under California law to deny the crime to the court, while admitting that there is sufficient evidence to convict him.

Ms. Kops, the public defender, testified that she interviewed Mr. Flores on one occasion between the entry of the plea and the sentencing, and that was the day before the sentencing. She reviewed the sentencing report with Mr. Flores. (RT 37). Ms. Kops wrote on the bottom of the pre-sentence report, "Bring appeal papers." By that notation, she meant that she was planning to take appeal papers to court for Mr. Flores to sign. (RT 38). She believed that it was a possibility that she told him he could file an appeal. (RT 39). On cross-examination, she stated that she did not believe that she had promised Mr. Flores that she would file an appeal for him, because she believed that if she had promised it, she would have done it. (RT 40). She agreed that the notation "Bring appeal papers" indicated that there may have been a discussion regarding an appeal. (RT 50). She also agreed that she may have written the note and forgotten to bring the appeal

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17. [Footnote 1 of Prisoner's Post-Hearing Brief.] COP indicates the transcript of the Change of Plea, attached hereto as Exhibit A. RT indicates Reporter's Transcript of the proceedings on the evidentiary hearing herein.

papers. (RT 51). She agreed that she may have said to him, "If you're not happy with the sentence, we can file an appeal," but forgot to bring the appeal papers. (RT 52). The interpreter who went over the sentencing papers with Ms. Kops and Mr. Flores-Ortega was not the court interpreter. (RT 63).

Mr. Flores discovered, within approximately four months, that his attorney had not filed an appeal. On March 24, 1994, he submitted a Notice of Appeal and Request for Certificate of Probable Cause, attached hereto as Exhibit B. On April 8, 1994, the Clerk of the Court refused to file the Notice, and referred him to the Court of Appeal. On August 12, 1994, the Fifth District Court of Appeal also declined to file his appeal. In his affidavit in support of his petition herein, he stated, "My attorney, Nancy Kops, told me that I had the right to appeal the judgment like the court said. I did not understand what an appeal was, so she explained that I could have a higher court look at my case. She (my attorney) then told me that she would file the papers for that (a notice of appeal), and I thanked her for that." (Exhibit C).

This court held that petitioner had not sustained his burden to show a breach of promise to file a notice of appeal on the part of the attorney, but left open the issue of whether he had consented to a failure to file a Notice of Appeal under *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995).

ARGUMENT

A. THIS COURT SHOULD PERMIT FILING OF THE NOTICE OF APPEAL; FAILURE TO FILE THE NOTICE OF APPEAL IN THIS CIRCUMSTANCE IS PER SE INEFFECTIVE ASSISTANCE OF COUNSEL

The order permitting evidentiary hearing in this matter permitted testimony solely on the credibility of petitioner's assertions that trial counsel promised to file a notice of appeal on his behalf. (ORDER).

In a petition under 28 U.S.C. §2254, it has been found to be a denial of effective counsel when an attorney fails to properly preserve his client's right to appeal. *Sanders v. Craven*, 488 F.2d 478, 479 (9th Cir. 1973). The petition in *Sanders* was similar, in that the attorney discussed the right of appeal with Sanders, but told him that it would cost too much, without advising him of his right to proceed in forma pauperis or that the notice of appeal must be filed within 10 days. Similarly, here, there was discussion of appeal between counsel and Flores-Ortega as indicated, objectively, by her notes, but a complete failure to complete the process of filing the Notice of Appeal.

Further, in *Sanders*, as in this case, there was some question about the phraseology used. The state argued that, "Sanders did not show that his counsel was aware of his desire to appeal, that his counsel knew of his indigence or that he in fact was ignorant of his in forma pauperis rights or the procedure to appeal." *Sanders*, 488 F.2d at 480. The court is not to consider the merits of the appeal, as the state court did in denying petitioner's request to file the notice, only whether the actions of counsel denied him his appellate rights.

Failure to file a notice of appeal is an error so serious that counsel was not functioning as the 'counsel'

guaranteed by the Sixth Amendment and the deficient performance prejudiced the defense. *United States v. Stearns*, 68 F.3d 328, 329 (9th Cir. 1995) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

Stearns follows a Ninth Circuit habeas case in which the court declared:

> We hold that prejudice is presumed under *Strickland* if it is established that counsel's failure to file a notice of appeal was without the petitioner's consent.

Lozada v. Deeds, 964 F.2d 956, 958-959 (9th Cir. 1992).

The question of whether the fact that this was a guilty plea rather than a trial was "a distinction without a difference." *Stearns*, 68 F.3d 330.

It is clear that in this habeas case, this court must find that counsel was ineffective for failure to file a notice of appeal. The court has had the opportunity to see Mr. Flores and realistically judge whether he would understand any intricacies of the law of appeal. Most likely, if appeal rights were discussed, Ms. Kops said she would prepare the papers. If the rights were not discussed, then the matter should be reversed. The record is clear that Flores-Ortega did not consent to the failure to file the notice of appeal. This court stated that it is clear that, "Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game." (RT 75).

///

///

///

CONCLUSION

Since Mr. Flores-Ortega did not consent to the failure of his counsel to file a notice of appeal, this court should grant the petition for writ of habeas corpus.

Dated: March 14, 1997

Respectfully submitted,

QUIN DENVIR
Federal Defender

_____

ANN H. VORIS
Assistant Federal Defender
Attorney for Defendant
LUCIO FLORES-ORTEGA

FINDINGS AND RECOMMENDATIONS RE: PETITION FOR WRIT OF HABEAS CORPUS FILED APRIL 3, 1 '7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, *Petitioner,*	) No. CV F-95-) 5612) GEB HGB P
v.	)
ERNEST C. ROE, *Respondent.*	) FINDINGS AND) RECOMMENDATIONS) RE: PETITION FOR) WRIT OF HABEAS) CORPUS

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C § 2254.

BACKGROUND

Petitioner was charged by information in case number 490730-9 in the Superior Court of the State of California, County of Fresno, with murder, with a personal use of a deadly weapon enhancement, and two counts of assault with a deadly weapon. Pursuant to a plea bargain, petitioner pled guilty to second degree murder and on November 10, 1993, was sentenced to 15 years to life in state prison.

Petitioner did not file a timely notice of appeal. However, on March 24, 1994, petitioner attempted to file a notice of appeal but was advised by the Clerk of

the Fresno County Superior Court that his notice was not filed because it was untimely. Petitions for a writ of habeas corpus were filed with both the California Court of Appeal for the Fifth Appellate District and with the California Supreme Court alleging ineffective assistance of trial counsel due to counsel's failure to file a timely notice of appeal. Both petitions were denied, the latter on January 18, 1995.

The instant petition for a writ of habeas corpus was filed in this court on July 27, 1995, and respondent's answer, filed on November 17, 1995, concedes petitioner has exhausted his state court remedies.

DISCUSSION

On October 13, 1993, the date set for his jury trial to commence, petitioner appeared in Superior Court with his court appointed public defender, Ms. Nancy Kops, and a state certified Spanish interpreter and entered a plea of guilty to second degree murder. The plea was entered pursuant to a plea bargain and *People v. West*, 3 Cal.3d 595 (1970), permitting petitioner under California law to deny commission of the crime while admitting there was sufficient evidence to convict him. In accord with the bargain, the prosecutor moved to strike the personal use of a deadly weapon enhancement allegation and to dismiss two additional felony charges of assault with a deadly weapon.

In the instant petition, petitioner alleges that Ms. Kops was constitutionally ineffective in failing to file a notice of appeal on his behalf after promising to do so.

This court ordered an evidentiary hearing to be held on the limited issue of the credibility of petitioner's assertions that Ms. Kops promised to file a notice of appeal on his behalf. The court appointed the Office of the Federal Defender to represent petitioner in connection with the evidentiary hearing.

The evidentiary hearing was held on January 24, 1997. Petitioner was represented by Assistant Federal Defender Ann H. Voris and respondent was represented by Paul E. O'Connor, Deputy Attorney General of the State of California. Testimony was received from petitioner, from Ms. Kops, and from Cheryl Sauceda, the certified court interpreter at both the change of plea hearing on October 13, 1993, and the sentencing hearing on November 10, 1993.

At the conclusion of the evidentiary hearing, this court noted on the record, "It is clear to me that Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game."

This court made a factual finding that petitioner had not met his burden of proving by a preponderance of the evidence that Ms. Kops had promised to file a notice of appeal on his behalf. (Evidentiary hearing transcript, p. 75-76.)

This court further found that petitioner did not consent to Ms. Kops' failure to file a notice of appeal. (Evidentiary hearing transcript, p. 74.)

Counsel were asked to file post-hearing briefs addressing the question of whether petitioner is entitled to relief under *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), in light of the above factual findings. Post-hearing briefs on behalf of both parties were filed on March 14, 1997. Although the parties were granted until March 21, 1997, to file a response to the other party's post-hearing brief, no such responses were filed.

In *Stearns*, *supra*, Stearns pleaded guilty to bank robbery in the federal district court and was sentenced. He did not file an appeal, but two years later filed a habeas petition alleging that his attorney failed to file an appeal, as requested. Relying upon its earlier decisions in *United States v. Horodner*, 993 F.2d 191 (9th Cir. 1993) and *Lozada v. Deeds*, 964 F.2d 956 (9th Cir.

1992), a state conviction, the Ninth Circuit reversed the district court's denial of the petition holding that "the answer turns on the question of whether the petitioner consented to the failure to file a notice of appeal. Of course, Stearns says that he did make a request, but he need only show that he did not consent to the failure to file." *United States v. Stearns*, *supra*, 68 F.3d at 330. The court further held that prejudice is presumed under *Strickland v. Washington*, 466 U.S. 668, 687 (1984) if it is established that counsel's failure to file a notice of appeal was without the Stearns' consent. *United States v. Stearns*, *supra*, 68 F.3d at 329.

The *Stearns* court also noted that cases from two other circuits had held that an attorney's failure to appeal after a guilty plea results in ineffective assistance of counsel without a specific showing of prejudice, citing to *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) and *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993). Regarding these cases, the *Stearns* court stated:

> The law applied in those cases was slightly different from the law of this circuit because in those cases the petitioner had requested that an appeal be filed, and counsel had not followed the request. *Castellanos*, at least, put much weight on the need for that request. 26 F.3d at 719. In doing so it relied on cases where a request was made after a trial, and stated that a "'[r]equest' is an important ingredient in this formula."

United States v. Stearns, *supra*, 68 F.3d at 330.

Noting that both *United States v. Horodner*, *supra*, and *Lozada v. Deeds*, *supra*, involved habeas petitions filed after convictions following trial, respondent argues

that petitioner is not entitled to relief under *Stearns* because that case states a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) and has no retroactive application. *Teague* held that a new rule of law will not be applied to cases on collateral review where conviction was final prior to the new rule's announcement. *Id*. at p. 310. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id*. at p. 301; *see also Penry v. Lynaugh*, 492 U.S. 302, 313, (1989).

The Supreme Court recently spelled out how *Teague* must be applied where the State argues that a petitioner seeks the benefit of a new rule of constitutional law:

> In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must "[s]urve[y] the legal landscape as it then existed," and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Finally, even if the court determines that the defendant seeks the benefit of the new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Caspari v. Bohlen, 510 U.S. 383, 389-390 (1994) (internal citations omitted).

In our present case, petitioner was sentenced on November 10, 1993, and had 60 days within which to file a notice of appeal. California Rules of Court, rule 31(a). No notice of appeal was filed within that time and petitioner's conviction therefore became final on January 9, 1994.

The Ninth Circuits decision in *Teague* was filed on October 12, 1995.

Surveying the legal landscape of California as of January 9, 1994, a sentencing court was not required to advise a defendant of his appeal rights following a guilty plea. Cal. Rules of Court, rule 470. However, in a noncapital criminal case, where the defendant would be entitled to the appointment of counsel on appeal, the attorney representing the defendant at trial was under a duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." Cal. Pen. Code, § 1240.1, subd. (a). Subdivision (b) of section 1240.1 provided in pertinent part:

> (b) It shall be the duty of every attorney representing an indigent defendant in any criminal . . . case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue such relief as may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

In the present case, Ms. Kops was appointed to represent petitioner, an indigent, who entered a guilty

plea to second degree murder. Ms Kops testified that in her opinion the only grounds for appealing would have been that the sentencing court abused its discretion in denying probation and an appeal on that ground "would almost certainly fail." (Evidentiary hearing transcript, p. 43-44.) Ms. Kops also testified that while she would not have encouraged petitioner to file an appeal, had he asked her to do so she would "still go ahead and file it." (Evidentiary hearing transcript, p. 49.)

It would appear, therefore, that Ms. Kops would have been under no statutory duty to file an appeal on behalf of petitioner under California law. No California or federal case law has been found holding, prior to the decision in *United States v. Stearns*, *supra*, 68 F.3d 328, that an attorney, either retained or appointed, had a duty to file a notice of appeal for a defendant following a guilty or no contest plea, absent a specific request by the defendant. In fact, federal cases specifically stated that an attorney had no duty to advise his or her client of the right to appeal following a guilty plea and, in the absence of a request, failure to file a timely notice of appeal after a guilty plea did not constitute ineffective assistance of counsel. *See, e.g.*, *United States v. Lewis*, 880 F.2d 243, 246 (9th Cir. 1989); *Marrow v. United States*, 772 F.2d 525, 528 (9th Cir. 1985) (and cases cited); *see also Belford v. United States*, 975 F.2d 310, 314 (7th Cir. 1992) (and cases cited); *Castellanos v. United States*, *supra*, 26 F.3d 717, 719; *Carey v. Leverette*, 605 F.2d 745, 746 (4th Cir. 1979) (despite a earlier contrary holding by the same circuit in *Nelson v. Peyton*, 415 F.2d 1154 (4th Cir. 1969).

It seems clear under the "legal landscape as it then existed," no California court "would have felt compelled by existing precedent" to hold that in the absence of petitioner's consent, Ms. Kops' failure to file a timely notice of appeal constituted a denial of effective

assistance of counsel. *See Caspari v. Bohlen*, *supra*, 510 U.S. at 390.

Turning to the third step of the analysis, it also seems clear that the "new rule" does not fall within either of the two narrow exceptions to the nonretroactivity principle. *Teague* held that a new rule may still be applied retroactively if it fits into one of two narrow exceptions. First, a new rule should be applied retroactively if it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 307 (citations omitted). Or, as the Supreme Court further explained in *Sawyer v. Smith*, 497 U.S. 227 at page 241, the first exception "applies to new rules that place an entire category of primary conduct beyond the reach of a the criminal law . . . or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense, . . . The second *Teague* exception applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." (citations omitted.)

Clearly, the new rule announced in *Stearns* would not fall within the first *Teague* exception.

As to the second exception, the *Sawyer* court further explained, "It is thus not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also, '"alter our understanding of the bedrock procedural elements"' essential to the fairness of the proceeding." *Sawyer v. Smith*, *supra*, 497 U.S. at 242. And, "As we stated in *Teague*, because the second exception is directed only at new rules essential to the

accuracy and fairness of the criminal process, it is 'unlikely that many such components of basic due process have yet to emerge.'" 467 U.S. at 243.

The *Stearns* rule, that a defendant who does not consent to his attorney's failure to file a timely notice of appeal will be deemed to have received prejudicial ineffective assistance of counsel, would appear to have nothing to do with the accuracy of the trial nor would it alter the underlying procedural elements essential to the fairness of the proceeding. At most, retroactive application of the *Stearns* rule to this case would allow petitioner to file a belated appeal in the state courts if the trial court would issue a certificate of probable cause for such an appeal pursuant to California Penal Code, section 1237.2.[18]

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18. [Footnote 1 of Findings and Recommendations Re: Petition for Writ of Habeas Corpus]

California Penal Code, section 1237.2 provides:

> No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following admission of violation, except where both the following are met:
>
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.
>
> (b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that the petition for a writ of habeas corpus be DENIED.

These findings and recommendations are submitted to the assigned District Judge, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Oilseed*, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 3, 1997

HOLLIS G. BEST
UNITED STATES MAGISTRATE JUDGE

ORDER RE: FINDINGS AND RECOMMENDATION AND OBJECTIONS FILED JUNE 30, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, Petitioner,	CIV F-95-5612 GEB HGB P
v.	ORDER RE: FINDINGS & RECOMMENDATION
ERNEST C. ROE, Respondent.	(#27) AND OBJECTIONS (#28)

Petitioner, a state prisoner proceeding in forma pauperis with appointed counsel, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On April 3, 1997, the magistrate judge filed findings and recommendation herein which were served on both parties and which contained notice to both parties that any objections to the findings and recommendation were to be filed within thirty (30) days. On May 2, 1997, petitioner filed timely objections to the findings and recommendation.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, the court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendation to be supported by the record and by proper analysis.

Accordingly, THE COURT HEREBY ORDERS that:

1. The Findings and Recommendation filed April 3, 1997, is adopted in full; and

2. Petitioner's application for writ of habeas corpus is denied.

DATED: June 30, 1997

GARLAND E. BURRELL
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
OPINION
FILED NOVEMBER 2, 1998

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lucio Flores Ortega, *Petitioner-Appellant,*	)	No. 97-17232
v.	)	D.C. No.
Ernest C. Roe, Warden, *Respondent-Appellee.*	)	CV-95-05612 GEB
	)	OPINION

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding
Submitted Oct. 5, 1998*
San Francisco, California
Filed November 2, 1998

Before: Robert R. Beezer, Cynthia Holcomb Hall and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Beezer.

* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); Ninth Circuit Rule 34-4.

COUNSEL

Ann H. Voris, Assistant Federal Defender, Fresno, California, for the petitioner-appellant.
Paul E. O'Connor, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

BEEZER, Circuit Judge:

Lucio Flores Ortega appeals the denial of his petition for habeas corpus. We address the question whether our opinion in *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), expressed a new rule barred from application in the present matter by *Teague v. Lane*, 489 U.S. 288 (1989). We hold that *Stearns* did not express a new rule, rather it was an application of the rule in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992). We have jurisdiction pursuant to 28 U.S.C. § 2253 and we reverse.

I
A

Petitioner pled guilty to second degree murder in a California Superior Court on October 13, 1993. At the plea hearing, petitioner was represented by a public defender. During the hearing the public defender wrote in her file "bring appeal papers." On March 24, 1994 petitioner attempted to file a notice of appeal which was rejected as untimely.

Petitioner filed a state court petition for a writ of habeas corpus on the ground that trial counsel was ineffective for failing to file a timely notice of appeal. Petitioner subsequently exhausted his state court remedies.

On July 27, 1995, petitioner filed a federal petition for habeas corpus. Respondent answered on November 17, 1995. The matter was referred to a magistrate judge, who held an evidentiary hearing on the limited issue of the credibility of petitioner's assertions that his state trial counsel promised to file a notice of appeal on his behalf.

After the hearing, the magistrate judge made the following findings: Petitioner "had little or no understanding" of what an appeal meant or the appeals process. Petitioner had not proved that his counsel had promised to file a notice of appeal. Petitioner did not consent to counsel's failure to file a notice of appeal. The magistrate judge considered whether our opinion in *Stearns* applied to petitioner's claims but ultimately concluded that petitioner was not entitled to relief under *Stearns* on the theory that *Stearns* stated a "new rule" which could not be applied retroactively under *Teague v. Lane*.

The district court adopted the magistrate judge's recommendation that the petition be denied. The court subsequently granted petitioner a certificate of probable cause and this timely appeal followed.

B

We review de novo the denial of a § 2255 motion. *Stearns*, 68 F.3d at 329. The district court's factual findings are reviewed for clear error. *United States v. Cruz-Mendoza*, 147 F.3d 1069, 1072 (9th Cir. 1998).

To establish ineffective assistance of counsel, a petitioner must prove that: (1) counsel's performance was ineffective and (2) the ineffective performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In *Stearns*, we held that failure to appeal after a plea agreement is ineffective assistance of counsel without a specific showing of prejudice. *Stearns*, 68 F.3d at 329-30. A petitioner "need only show that he did not consent to the failure to file." *Id.* at 330. The magistrate judge found that petitioner did not consent to the failure to file a notice of appeal. This finding, reviewed for clear error, resolves the application of *Stearns* in petitioner's favor.

II

Resolution of the present matter hinges on whether we expressed in *Stearns* a "new rule" as defined by *Teague*. *Teague* requires a three-step analysis. First, the court must determine the date on which the petitioner's conviction became final. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). Second, it must "[s]urvey[ ] the legal landscape as it then existed," *Graham v. Collins*, 506 U.S. 461, 468 (1993), to "determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule . . . was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Finally, "if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity." *Lambrix v. Singletary*, 520 U.S. 518, ___, 117 S.Ct. 1517, 1524-25 (1997).

Those exceptions apply where either (1) "the rule places a class of private conduct beyond the power of the State to proscribe . . . or addresses a substantive categorical guarante[e] accorded by the Constitution;" or (2) the rule announces a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham*, 506 U.S. at 477-78 (internal quotations omitted). Watershed rules are those which are "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313. The exception is "meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Graham*, 506 U.S. at 478 (internal quotations omitted).

Steps one and three of the *Teague* analysis are clearly resolved in respondent's favor. *Stearns* postdates

petitioner's case. Petitioner was sentenced on November 10, 1993, and had 60 days within which to file a notice of appeal. *Stearns* was filed on October 12, 1995. Additionally, *Stearns* does not fit under the narrow exceptions to *Teague* reserved for rules that go to the fundamental fairness of the adjudicative process.

The second element of the *Teague* analysis, however, requires reversal. A "new rule," as contemplated by *Teague*, is one which "'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or 'was not dictated by precedent existing at the time the defendant's conviction became final.'" *Snook v. Wood*, 89 F.3d 605, 612 (9th Cir. 1996) (quoting *Teague*, 489 U.S. at 301).

Stearns tracks our opinion in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992), which predates petitioner's conviction. In *Lozada*, we held that "'prejudice is presumed under *Strickland* if it is established that counsel's failure to file a notice of appeal was *without the petitioner's consent*.'" *Stearns*, 68 F.3d at 329 (quoting *Lozada*, 964 F.2d at 958) (emphasis in original). In *Stearns*, we reasoned that *Lozada* "would automatically demand reversal in this case, but for one distinction[:] The judgement in this case was entered after a plea rather than after a trial." *Id.* at 330. We conclude that *Stearns* was merely an application of the rule in *Lozada*. Petitioner does not rely on a new rule and his petition is not barred by *Teague*.

III

The district court is instructed to issue a conditional writ releasing Ortega from state custody unless the state trial court vacates and reenters petitioner's judgment of conviction and allows a fresh appeal. We REVERSE and REMAND.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
JUDGMENT -
FILED NOVEMBER 2, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-17232
CT/AG#: CV-95-05612-GEB

LUCIO FLORES ORTEGA
Petitioner - Appellant

v.

ERNEST C. ROE, Warden
Respondent - Appellee

APPEAL FROM the United States District Court for the Eastern District of California (Fresno).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Fresno) and was dully submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED

Filed and entered November 2, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
ORDER DENYING REHEARING AND REJECTING
SUGGESTION FOR REHEARING EN BANC
FILED DECEMBER 11, 1998

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCIO FLORES ORTEGA,	)	No. 97-17232
Petitioner-Appellant,	)	
v.	)	D.C. No.
ERNEST C. ROE, Warden,	)	CV-95-05612
Respondent-Appellee.	)	GEB
	)	
_____	)	ORDER

Before: BEEZER, HALL and RYMER, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judge Rymer votes to reject the suggestion for rehearing en banc and Judges Beezer and Hall so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES SUPREME COURT
ORDER GRANTING CERTIORARI
MAY 3, 1999

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

May 3, 1999

Mr. Paul Edward O'Connor
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

Re: Ernest C. Roe, Warden
v. Lucio Flores Ortega
No. 98-1441

Dear Mr. O'Connor:

The Court today entered the following order in the above entitled case:

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 2 presented by the petition.

Sincerely,

William K. Suter, Clerk